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In the Matter of	
Distribution of the 1998 and 1999 Cable Royalty Funds	**Docket No. 2001-8 CARP CD 98-99**

REBUTTAL FINDINGS AND CONCLUSIONS OF THE JOINT SPORTS CLAIMANTS

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I. INTRODUCTION AND SUMMARY

A.

All parties share the same view of the Panel's mission – to determine the relative market values of the different categories of copyrighted works, while taking account of past precedent, changed circumstances and new evidence. And even PTV now appears to concede that the Panel must make that determination by valuing the programming actually carried rather than the programming that might have been carried. But the parties diverge on the best approach to determining relative market value. NAB and PTV, for example, understandably urge the Panel to ignore seller side considerations, even though precedent establishes that any assessment of market value involves consideration of both the willing buyer and the willing seller. And PTV suggests that the Panel determine value with math rather than judgment – that the Panel should simply throw into the hopper whatever studies are offered and then average their results (as creatively modified by PTV), without differentiating among those studies and the weight to be accorded each one.

The CARP process relies on arbitrators, not accountants. Never before has any CRT or CARP even intimated that a party's award can or should be the product of simply averaging the available study results, modified or unmodified. As PTV has recognized, time studies have been given "little or no weight." PTV PFOF at ¶459. Furthermore, the central issue litigated in the last two proceedings (at considerable expense and effort) concerned the weight to be accorded the Bortz surveys of cable operator valuations and the Nielsen tabulations of subscriber viewing time. As a result of extensive record development, there has been a decided shift in the weight afforded each of these studies – from primary reliance upon Nielsen (characterized by the CRT, more than 20 years ago

in the 1979 proceeding, as the "starting point") to primary reliance upon the Bortz survey (considered in the 1990-92 proceeding to be "highly valuable" for determining market value and in the 1989 proceeding to have "substantial weight" for an award when corroboration exists). With that shift, strongly supported by PTV as well as NAB and the Devotionals, JSC's award has moved much closer to its Bortz share than its Nielsen share (and significantly beyond any average of the results in the two studies).

PTV's novel averaging approach is not only inconsistent with the precedent PTV helped establish; it also unfairly and improperly disadvantages the Bortz study. PTV witness Dr. Johnson said that the cable operator respondents to the Bortz survey take account of viewing time in providing their estimates of relative program value. *See* Tr. 9118 (Johnson). To the extent that viewing time is relevant and is reflected in the Bortz respondent valuations, averaging the Bortz and Nielsen results would effectively result in double-counting Nielsen, which is purely a measure of viewing time. The same may be said of averaging the Bortz survey results with other time-based studies. To the extent that time has any role in determining relative market values, time considerations are already accounted for in the Bortz survey results and should not be double-counted by averaging Bortz survey with the time studies.

JSC strongly believe that the Panel should accord even greater weight to the Bortz survey results than did the CARP majority in the 1990-92 proceeding. No other study provides a better estimate of relative market values. In addition, as discussed in JSC's initial findings, the "limitations" that the 1990-92 CARP majority attributed to the Bortz study do not provide a proper basis for discounting the results of that study – particularly given the fact that the new NAB/Rosston regression analysis provides ample "actual

behavior" corroboration of the Bortz survey results. Moreover, the record here provides an even stronger basis for according less weight to Nielsen. A comparison of the "unprecedented" NAB/Fratrik study and the bottom-line Nielsen results establishes more clearly than ever before that the Nielsen study is nothing more than another measure of time. And, as Program Suppliers own experts acknowledge, the bottom-line Nielsen tonnage results must be adjusted if they are to reflect market value. While there are multiple controversial approaches to making the necessary adjustments (with Program Suppliers improperly adding yet another at the eleventh hour in their findings), all suggest viewing numbers for JSC that are higher than the JSC viewing numbers in any prior proceeding.

In short, the Bortz survey results should not simply be averaged together with the results of Nielsen or any other study. Rather, the Bortz survey results should serve as the starting point for determining the relative value of the different categories of eligible programming. The Panel should depart from those results only where there is a substantial record basis for doing so. Nothing in the record supports such a departure for the JSC award. JSC's award should be set at the same level reflected by the Bortz survey.

B.

NAB and PTV argue in their findings, as they have repeatedly argued throughout this proceeding, that the conversion of WTBS represents a "sea change," a "seismic" event that changed the landscape of the distant signal marketplace and warrants a significant increase in their royalty shares. They, of course, made a similar argument in the 1990-92 proceeding, claiming that the FCC's reimposition of syndex rules (which

reduced the quantity of retransmitted syndicated programs) resulted in another "sea change" that warranted a significant increase in their royalty shares. Based on the "sea change" du jour, PTV now wants the Panel to increase its award by approximately $6 million per year – notwithstanding that the 1998 and 1999 royalty funds are each approximately $45 million smaller than each of the 1990-92 funds. Not to be outdone, NAB wants a more than $8 million per year increase. Stated otherwise, PTV and NAB are not simply requesting the dollar amount they would have received absent the TBS conversion; collectively, they want over $14 million per year more than that amount.

In the final analysis, the "sea change" on which NAB and PTV rely in this proceeding represents nothing more than a shift in relative amounts of time occupied by different program categories (as was the case in the 1990-92 proceeding). Such shifts do not, in and of themselves, predetermine changes in relative market value. And, of course, relative market value is all that is important here. As NAB's own expert witness acknowledged, an increase in the relative amount of distant signal time occupied by the commercial television category from 8% to 13% does not necessarily mean that NAB is entitled to a similar increase in its share of royalties. *See* Tr. 8983 (Ducey). That view is particularly convincing given the nature of the compulsory license for which royalties are paid. Cable operators purchase entire signals, not individual programs or program categories; and in certain cases (particularly with regard to partially-distant PTV signals) their purchase of entire signals is mandated by the must carry rules. Consequently, this is not a case where the relative amounts of programming precisely reflect willing purchaser decisions and thus correspond with the preferences of those purchasers. According to PTV's Dr. Fairley, cable operators carried certain programming pursuant to the

compulsory license that they would not have carried in a free marketplace. *See* Tr. 10631 (Fairley).

NAB and PTV also have sought to leave the impression that the only reason for this proceeding is to consider the effect of the TBS conversion. Nothing could be further from the truth. Since the last litigated proceeding involving the years 1990-92, there have been a host of issues that have affected JSC's and the other parties' perceptions of the fairness or unfairness of the 1990-92 awards (both independent of and in light of the TBS conversion). It is reasonable to say that disagreement concerning the effect of the TBS conversion is the straw that broke the camel's back. But it is wrong to say that the only issue dividing the parties concerns that conversion. From JSC's perspective, this proceeding is the product of disagreement over a series of issues:

- The CARP in the 1990-92 proceeding awarded PTV more than 2 ½ times the amount of royalties that were paid for PTV programming, while inconsistently tying the Canadian award to the royalties paid for Canadian programming. As a result, U.S. commercial copyright owners, including JSC, received unjustifiably less than even the paltry amount that cable operators paid to carry U.S. commercial signals. To add insult to injury, PTV now claims that, even though it necessarily received a portion of the royalties attributable to WTBS, WWOR and other U.S. commercial signals, PTV should not bear any portion of the reduction in royalties caused by the conversion of WTBS and the loss of WWOR from satellite.

- There also is no question that NAB received a portion of the royalties attributable to WTBS and WWOR. Indeed, NAB's Dr. Ducey testified in prior proceedings about the supposedly very attractive station-produced programming on WTBS and WWOR. Yet NAB (perhaps recognizing that the best defense is a good offense) remarkably claims that it too should bear none of the loss in royalties attributable to the TBS conversion and loss of WWOR from satellite. Indeed, as noted above, NAB (like PTV) wants its dollar amount increased.

- All parties have claimed that the total compulsory licensing royalties paid by cable operators fall well below fair market

compensation. Only by replacing compulsory licensing with marketplace negotiations can JSC and other copyright owners begin to receive the level of royalties that their programming is worth. NAB and PTV, however, have steadfastly and successfully blocked efforts by copyright owners to eliminate the cable compulsory license. NAB and PTV's support of compulsory licensing has not only prevented JSC from receiving marketplace compensation for the retransmission of their programming; it also has graphically revealed that NAB and PTV lacked confidence that, in the marketplace, their members would be able to earn as much as they are already receiving through the compulsory license. Obviously, NAB and PTV believe that they have better luck in the CARP hearing room – where their success comes at the expense of other copyright owners – than in the marketplace – where they must convince knowledgeable cable operators about the worth of their programming.

- NAB's stance on the TBS conversion and compulsory licensing is particularly disturbing given their successful efforts to have rate regulation imposed on cable operators – efforts that have resulted in significant reductions in the compulsory licensing royalties that cable operators pay. Only in the CARP hearing room do the broadcasters evidence any concern with the amount of compulsory licensing royalties that they receive – otherwise preferring to trade the compensation that they (as well as JSC and other copyright owners) receive for other benefits.

- In the 1992 Cable Act, the NAB was able to secure for its members the right that JSC is denied – to bargain directly with cable systems for the right to retransmit the programming on commercial television signals, including JSC programming. NAB's members, however, were unable or unwilling to negotiate any significant royalties for such carriage. This failure demonstrated that, in the nearly the same market as the Panel is trying to simulate, NAB's members find more value in the carriage of their signals by cable systems than in the compensation they could demand for that carriage. At the same time, the commercial broadcasters' failure to derive significant revenues from retransmission consent limited the amount that JSC members could obtain in marketplace negotiations for carriage of their programming by those commercial stations.

There are additional considerations that certainly have influenced JSC's perceptions of the 1990-92 awards – including the CARP majority's treatment of the Bortz survey results and JSC's inappropriate subsidization of the overly-generous Music

awards. In one respect or another, all of the above considerations have relevance to the central issue before the Panel in this proceeding – determining relative market value based on past precedent, changed circumstances and new evidence.

II. BORTZ SURVEY

A. Relevance And Weight

1. JSC's Proposed Findings established that the Bortz survey should be the starting point for the Panel's determination. The Bortz survey, as discussed at paragraphs 38-45 of JSC's Proposed Findings, is the best evidence of the relative marketplace value of the programming categories studied. Furthermore, the JSC's Proposed Findings described how the "limitations" on the Bortz survey discussed in the 1990-92 CARP Report do not provide a proper basis for reducing the weight given to the Bortz survey. *See* JSC PFOF at ¶¶55-72.

2. NAB also supports the Bortz results as the "starting point:"

> "The best quantitative measure of the relative marketplace value of distant signal programming categories is the Bortz cable operator survey. Its results provide a substantial starting point for determination of the royalty awards for 1998-1999."

NAB PFOF at ¶220. *See also id.* at ¶60 (the Bortz survey "appropriately measures the marketplace value of distant signal program categories," and provides a "measure the Panel can use directly, by focusing on the distant signals the cable operators actually chose to purchase and actually carried during 1998 and 1999"); *id.* at ¶224 ("The Commercial Television share should be based on its Bortz Survey shares . . . ."). Although the Canadians do not expressly support Bortz as the starting point, their proposed royalty allocations for all programming claimants (other than themselves) are plainly based on the Bortz results. *See* Canadian PFOF at Appendices B-E. *Cf. also*

1990-92 CARP Report at 26 (noting that the Bortz survey was the centerpiece of the Devotional Claimants' case as well).

3. PTV's position with regard to the Bortz survey is more complex. PTV acknowledges that the Bortz survey focuses on the "proper question . . . the analytical issue most relevant to this proceeding," *i.e.,* "How do cable operators relatively value programming in terms of attracting and retaining subscribers?" PTV PFOF at ¶480. PTV recognizes that the Bortz study provides "empirical information on the relative value to cable operators of different distant signal programming categories." *Id.* Nevertheless, PTV says that the Bortz study is merely "another valuable input. . . an important cornerstone." *Id.* PTV appears to suggest that the Bortz results should be averaged with the results of Nielsen and other studies to determine relative market values, thereby effectively according equal weight to Bortz, Nielsen and the other studies. *See* PTV PFOF at ¶662 and n. 54 (Table 31).

4. PTV's position in this proceeding contrasts dramatically with the position it took in the 1990-92 CARP proceeding (and in prior proceedings). For example, PTV urged the 1990-92 CARP to make the following findings and conclusions:

* "The Bortz survey presented by the Joint Sports Claimants provides the most reliable source of information available on the benefits to cable operators from the distant signal retransmission of different programming types." 1990-92 PTV PFOF ¶388.

* "Unlike . . . household viewing hours, which provide virtually no insight into the benefits to cable operators flowing from distant signal retransmission, the Bortz study is a well-conceived effort to measure the benefits and value to cable operators from different types of programming available via distant transmission." *Id.* at ¶389.

* "In contrast to the Nielsen viewing study, the Bortz survey is far better suited to address the real-world considerations underlying a cable operators' valuation of distant retransmission – because through an allocation of value among distant signals the cable operator takes into

account a host of factors beyond simple viewing data that will affect its assessment of the benefits of particular distant signal programming." *Id.* at ¶390.

* "PBS submits that the Bortz survey should be given controlling weight as a basis for allocating royalties – because it asks the right question; it relates directly to the Panel's task in simulating a marketplace exchange between cable operators, distant signals and program owners; and it has been corroborated by the Ford/Ringold survey and other record evidence." *Id.* at ¶399.

* "The Nielsen study does not address the criteria of relevance in this proceeding because it fails to measure either the benefits to cable operators from distant signal retransmission or the marketplace value of the retransmitted programming." *Id.* at 411.

* "[T]he overwhelming weight of the evidence . . . establishes that viewing cannot measure the value of programming to cable operators, the reasons that people subscribe to cable, or the benefit of distant signal programming in terms of attracting and retaining subscribers." *Id.* at 412.

5. Certainly PTV is free to change positions. And the fact that it has done so is hardly surprising, given the significant increase in viewing time that the 1998-99 viewing studies attribute to PTV programming. But the position PTV took in the 1989 and the 1990-92 proceeding with regard to Bortz and Nielsen was supported by an extensive record that PTV along with JSC and other parties developed.[1] Based on that

[1] The 1990-92 CARP referred to certain of that testimony in its Report at pages 36-38 (Nielsen) and 52-54 (Bortz). *See also* 1989 CRT Determination, 57 Fed. Reg. at 15291, 15293. The relevant evidence, which has been incorporated into the record of this proceeding, also is discussed in paragraphs 38-50. The original written testimony of PTV witnesses Fuller and Johnson in this proceeding are also instructive. *See* Fuller W.D.T. at 20-25 (concluding that the Nielsen study "should not be given significant weight in this case"); Johnson W.D.T. at 27 (agreeing with conclusion of CARP majority in 1990-92 proceeding that the Bortz survey "is highly valuable in determining market value" and noting that the "validity of the Bortz surveys has been subject to exhaustive scrutiny, especially with respect to (a) adequacy of the methodology in linking responses to relative values of program categories (e.g. whether the supply side as well as the demand side must be considered) and (b) the adequacy of survey design and execution (e.g., sample size and characteristics, qualifications of respondents.").

record, the CRT and the CARP accorded the Bortz results greater weight, and the Nielsen results less weight, than in the past. Nothing in the record of this proceeding would support a reversal of that trend; nothing supports PTV's suggestion that the results of the two studies should be averaged, thereby giving them equal weight. To the contrary, as discussed in JSC's initial findings, the Bortz results are entitled to greater weight in this proceeding – the Panel should not depart from those results for any particular claimant unless there is a substantial record basis for doing so.

6. PTV also contends that because Dr. Johnson saw no changes in the relative share of the *Program Suppliers* between the 1997 and 1998 Bortz surveys, "major adjustments in the *PTV share*, accompanied by adjustments as well for movies and series, are needed if the Bortz numbers are to be useful to the CARP." PTV PFOF at ¶221-22 (emphasis supplied). However, as explained in the JSC's Proposed Findings at paragraphs 75-79, Dr. Johnson's "lack of responsiveness" theory fails as a matter of mathematics and survey research.[2]

7. Moreover, PTV completely ignores the evidence that the Bortz survey has been responsive to major changes in the distant signal marketplace when warranted. For example, the FCC's re-institution of the syndicated exclusivity rules in 1990 created a

[2] Dr. Johnson's criticism also stands in stark contrast to the written testimony that he himself submitted in this proceeding. *See, e.g.,* Johnson W.D.T. at 28 ("The credibility of the Bortz survey is enhanced by the plausibility and consistency in the numbers. Year-to-year variations shown in Table 9 are generally small, suggesting that cable operators as a group have fairly well-defined notions of the value of programming categories, rather than just pulling numbers out of the blue in quick response to questions. Such small variations suggest greater confidence than if they had estimated, say, 5% in one year and 20% the next for a given program category. Moreover, confidence intervals are small enough to show that these variations are statistically significant at a high (95%) confidence level.") (Citation omitted).

"watershed" year for the cable industry, forcing cable operators to black out on request any syndicated series or movie on a distant signal if a local broadcaster held exclusive licenses to that programming. *See* 1990-92 Maglio W.D.T. at 6 (D5:28). The syndex rules threatened to make "Swiss cheese" out of some distant signals, creating substantial customer dissatisfaction. *See id.* The reimposition of syndex rules forced cable operators to engage in a "comprehensive review of distant signal carriage." *See id.* The results of the "watershed" change and "comprehensive review" were evident in the Bortz survey. In 1989, the movies and syndicated series categories received total allocations of 48.1%, whereas in 1990 the two categories received an allocation of 44.5%, decreasing even further to 41.3% in 1991 and 41.6% in 1992. As such, Dr. Johnson's criticism that the Bortz survey is non-responsive to changes in the distant signal marketplace is factually inaccurate.[3]

B. Adjustments

8. Besides the adjustments necessary to take into account the seller's perspective as discussed in JSC's Proposed Findings and below in Section IV, only PTV offers adjustments to the results of the Bortz survey. In its Proposed Findings, PTV sets forth the adjustments to the Bortz survey it believes are necessary to take into account several supposed "biases." PTV proposes adjustments to account for (1) the PTV-only and Canadian-only systems ineligible for the Bortz survey; (2) the non-compensable programming on WGN; (3) the fact that PTV signals do not generate any 3.75%

[3] In addition, as in prior proceedings, Program Suppliers contend that the usefulness of the Bortz survey is limited because of the criticism that it is an "attitudinal" survey. As discussed in depth at paragraphs 60-64 of JSC's Proposed Findings, the criticism that the Bortz survey measures "attitudes" rather than "behavior" is unfounded.

royalties; (4) the "automatic zero" assigned to the PTV (Canadian) category when no PTV (Canadian) distant signals are carried by the respondent system; and (5) the "threshold effect" of obtaining valuations of commercial program categories that cable operators might not have carried.

9. With regard to the PTV-only and Canadian-only systems, JSC already have agreed that some adjustment is appropriate – that the Bortz study by itself provides a basis for allocating royalties paid by all cable systems other than the PTV-only and Canadian-only systems. As discussed in paragraphs 87-96 of JSC's Proposed Findings, JSC disagree with Dr. Fairley's unweighted adjustment, which would give PTV far more in royalties than the amount that those PTV-only systems actually paid into the royalty fund, and point to the adjustments proposed by James Trautman.[4] Furthermore, JSC respond to the 3.75% Fund and WGN adjustments in paragraphs 80-84 and 106-112, respectively. While JSC also respond to the automatic zero and threshold effect adjustments in paragraphs 97-105, several additional points should be noted concerning PTV's discussion of these adjustments.[5]

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[4] NAB states without explanation that Mr. Trautman's adjustment is based on a "faulty fee-generated" calculation. *See* NAB PFOF at p. 156 (Proposed Allocation Calculation Methods at ¶3). While it is true that Mr. Trautman's first approach (based on the 1990-92 CARP's award to the Canadian Claimants) is based on a fees-generated analysis, NAB does not explain how Mr. Trautman's calculation is faulty either mathematically or theoretically. However, as discussed in paragraphs 338-45 of JSC's Proposed Findings, it is appropriate to use PTV's fees-generated in setting the PTV award.

Furthermore, Mr. Trautman's second approach explicitly does not rely on fees-generated, but rather, simply adds the weighted value of the PTV-only systems directly to the PTV share – after accounting for the distortions caused by the 1.0 DSE minimum fee paid by systems carrying only a .250 DSE PTV signal. *See* Trautman W.R.T. at 6-8.

[5] NAB appears to reject the "automatic zero" and "threshold effect" adjustments in its Proposed Findings. In presenting the results of the "adjusted" Bortz survey, NAB does not show the results of these adjustments, nor does NAB present the results of Dr. Fairley's Method 1 or Method 2 adjustment. *See* NAB PFOF ¶65 & n. 189.

10. First. PTV essentially abandons Dr. Fairley's "automatic zero" Method 2 adjustment. PTV states that "neither Method 1 nor Method 3 presents the concerns raised by the 1990-92 CARP about whether it is appropriate to adjust the Bortz results for distant signals not actually carried." PTV PFOF at ¶188. It describes Methods 1 and 3 as the "preferred" methods in that "neither method requires the estimation of values for signals or program categories not actually carried." *Id.* at ¶484. When calculating the "averages" of the various quantitative measures, PTV excludes the results of Method 2 (which produces the lowest share for PTV) to "avoid the concerns raised regarding the estimation of missing values for programming not actually carried." *Id.* at ¶662 n.51. PTV thus acknowledges that programming that is not actually carried should not be valued for the purposes of this proceeding – thereby eliminating a significant adjustment that increased PTV's Bortz share, and decreased JSC's Bortz share, in the 1990-92 proceeding.[6]

11. Second, PTV's Proposed Findings continue the fiction that Method 1 is an "adjustment" to the Bortz survey results. *See* PTV PFOF at ¶190 ("Dr. Fairley . . . used the results from [his] regression to predict an *adjusted* Bortz share for all the categories.") (emphasis supplied). Method 1, however, is not an adjustment to the Bortz survey – it is a wholesale *replacement* of the results of the Bortz survey with Dr. Fairley's regression prediction of the Bortz survey shares based on respondents' answers to the preliminary questions. *See* Fairley W.R.T. at 29-31. As discussed in depth at paragraphs 100-02 of

[6] The Method 2 adjustment provided *less* of an increase for PTV's share in this proceeding than in the 1990-92 Proceeding, when it increased the PTV share from 3.0% to more than 6.0%. *Compare* 1990-92 CARP Report at 117 *with* PTV Ex. 9-R (showing less than 1% increase to PTV share as a result of the Method 2 "automatic zero" adjustment).

JSC's Proposed Findings, Dr. Fairley's Method 1 is not only based on a faulty premise, but his use of the responses to the preliminary Bortz survey questions is unfounded given the wide confidence intervals of those responses.

12. Because Method 1 was shown to be invalid, PTV's use of the results of Method 1 in generating its "averages" of the adjusted Bortz survey results is inappropriate. As seen in Dr. Fairley's testimony, Method 1 produces by far the highest share for PTV. *See* Fairley W.R.T. at 51. By "throwing out" Method 2 and including Method 1, PTV improperly increases the "average" adjusted Bortz survey result to 10.33%. *See* PTV PFOF ¶662 (Table 31). PTV should have thrown out Method 1 as well, leaving the PTV maximum "adjusted" Bortz survey share of 9.7% in 1998 and 8.1% in 1999, if the Panel made Dr. Fairley's PTV-only and Canadian-only adjustments, WGN adjustments and "threshold effect" adjustments. *See* PTV Ex. 10-R.

13. Third, PTV's abandonment of Method 2 and the invalidity of Method 1 leave Method 3 as the only remaining record basis for adjusting the Bortz survey to account for the "threshold effect." PTV acknowledged that Method 3 was "developed in part to respond to the concerns raised by the CARP in the 1990-92 Proceeding and by opposing claimants here" about the valuation of programming not actually carried. PTV PFOF at ¶188. As noted in paragraph 231 of JSC's Proposed Findings, Method 3 increases the adjusted Bortz survey share for JSC between 3.5 and 5.1 percentage points. In fact, the JSC is the primary beneficiary of the Method 3 adjustment inasmuch as Dr. Fairley calculates that JSC programming would be carried disproportionately more than other categories in the absence of a compulsory license. *See* Tr. 10631-32 (Fairley).

14. By contrast, the "threshold effect" adjustment only results in a minor adjustment to PTV's Bortz share. According to PTV Exhibit 10-R, the "threshold effect" adjustment increases PTV's share by 0.44 to 0.86 percentage points. The bulk of the increase to PTV that results from Method 3 comes from the PTV-only adjustment made by Dr. Fairley; that adjustment increases PTV's share by 3.95 percentage points even though the PTV –only systems accounted for only 2.5% of the 1998 and 1999 royalties paid by Form 3 systems. *See* PTV Ex. 10-R; JSC PFOF at ¶96.

III. OTHER QUANTITATIVE STUDIES

A. Rosston Regression Analyses

1. Relevance and Weight

15. No party, not even NAB, suggests that the Rosston regression analyses should serve as "starting points" for the awards for the programming categories. In making award recommendations for each of the programming categories, NAB relies on the results of the Bortz survey rather than the Rosston regression analyses. *See, e.g.*, NAB PFOF at ¶224 ("The Commercial Television share should be based on its Bortz Survey shares . . ."), ¶228 (Program Suppliers), ¶231 (JSC), and ¶236 (PTV). As NAB asserts, the Rosston regression analyses are most useful in corroborating the results of the Bortz survey. *See* NAB PFOF at ¶67.

16. As discussed in the JSC's Proposed Findings at paragraphs 148-52, the Rosston regression analyses have shortcomings that preclude their use as starting points for the Panel's analysis. However, JSC agree with NAB that the Rosston regression analyses do serve as corroboration for the Bortz survey results inasmuch as Dr. Rosston's econometric study of cable operator behavior produces results similar to the Bortz survey, which has been wrongly criticized in the past as a study of only "attitudes."

17. PTV gives inappropriate weight to the results of the Rosston regression analyses. PTV's Proposed Findings cite the results of the Greater-Than-Zero Rosston regression analysis as a foundation for the "zone of reasonableness" for the PTV award. *See* PTV PFOF ¶607 and Table 21. In doing so, PTV implicitly contends that the results of the Greater-Than-Zero Rosston regression analysis should be weighed equally with the results of the Bortz survey in determining the PTV award. However, there is no record basis for placing equal weight upon the two studies; rather, the Rosston regression analyses should be seen as corroborative of the Bortz survey, not an independent measure of value.[7]

B. Greater-Than-Or-Equal-To-One DSE Regression Analysis

18. Missing from both the NAB and PTV Proposed Findings is any discussion of Dr. Rosston's Greater-Than-Or-Equal-To-One regression analysis, which accords PTV and NAB lower shares than the Greater-Than-Zero analysis. As discussed in the JSC Proposed Findings at paragraph 146, the Greater-Than-Or-Equal-To-One regression analysis should be afforded the same weight as the Greater-Than-Zero regression analysis. Dr. Crandall testified that, given that systems carrying fewer than one DSE face a zero marginal royalty rate for acquiring distant signal programming, a model excluding those systems – the Greater-Than-Or-Equal-To-One regression – provides information that is at least as useful as a model that includes those systems – the Greater-Than-Zero regression. *See* Crandall W.R.T. at 6-7. The Greater-Than-Or-Equal-To-One model shows a royalty share for PTV of approximately 5.75% in 1998-99 combined, *see* JSC

[7] PTV's equal weighting of the Nielsen study and the Johnson "Adjusted Subscriber Instances" measure is discussed below in paragraphs 126-127.

Ex. 14-X, the same share PTV received before the Music adjustment in the 1990-92 Proceeding, *see* 1990-92 CARP Report at 143. PTV receives shares of 6.65% in 1998 and 4.81% in 1999 if the Greater-Than-Or-Equal-To-One regression analysis is performed separately for each year. *See* Crandall W.R.T. at Appendix 4.

19. The Greater-Than-Or-Equal-To-One regression analysis may be superior to the Greater-Than-Zero regression in other ways. Its results more closely track those of the Bortz survey. *Compare* JSC Ex. 14-X *with* JSC Ex. 1 at 3 (Bortz survey results). Dr. Rosston found that the similarity between the Bortz survey results and his Greater-Than-Zero regression analysis lent credibility to the results of his model. *See* Tr. 2920-21 (Rosston). If that is the case, then, *a fortiori*, the even closer similarity between the Bortz survey results and the Greater-Than-Or-Equal-To-One regression analysis results should strengthen the credibility of that model. Moreover, as noted in paragraph 146 of JSC's Proposed Findings, the Greater-Than-Or-Equal-To-One regression analysis has essentially the same explanatory power as the Greater-Than-Zero regression and produces more statistically significant coefficients than the Greater-Than-Zero model.

20. The Greater-Than-Or-Equal-To-One regression model has the additional advantage of being less distorted by the influence of partially distant signals. Because Dr. Rosston's regression analysis did not adjust the number of minutes of programming to account for partially distant signals, *see* Tr. 2637-38 (Rosston), PTV programming minutes accounted for approximately 20% of the programming minutes in his Greater-Than-Zero regression model, *see* Rosston W.D.T. at 23. Dr. Fratrik's time study, on the other hand, showed that PTV programming accounted for only 14.87% of distant signal programming time. *See* NAB Ex. 10, at 13. In the Greater-Than-Or-Equal-To-One

regression model, PTV programming accounts for 16.75% of the programming minutes, which more closely resembles the amount generated by the Fratrik study. *See* JSC Ex. 14-X. In fact, nearly all the shares of programming time in the Greater-Than-Or-Equal-To-One model are closer to the results of the Fratrik time study than the Greater-Than-Zero model:

Time Shares In NAB Time-Based Studies

Category	Fratrik Time Study	Greater Than Zero Analysis	Greater-Than-Or-Equal-To-One Analysis
Program Suppliers	60.38%	57.49%	60.18%
Sports	4.91%	3.58%	3.82%
Commercial TV	13.00%	13.37%	13.44%
Public Broadcasting	14.87%	20.13%	16.75%
Devotional	2.94%	3.16%	3.36%
Canadians	3.68%	1.93%	2.08%

See NAB Ex. 10, at 13; Rosston W.D.T. at 23; JSC Ex. 14-X.[8]

C. Volatility Of Rosston Regression Model

21. NAB's Proposed Findings ignore the volatility of the Rosston regression model. The NAB's Proposed Findings contain no discussion of the wide confidence intervals of the Rosston regression analyses, or the testimony of Dr. Frankel showing that the coefficients produced by the Rosston regression analyses varied wildly as variables were eliminated from the model. *See* Frankel W.R.T. at 12-13 and Table 1. *Compare* PTV witness Johnson W.D.T. at 28 (attaching significance to the small confidence

[8] As is evident from the above chart, the JSC's share of programming minutes in both Rosston regression models are substantially below what is reported in the Fratrik time study; JSC's share of the Fratrik time study is 37% higher than JSC's share of minutes in the Rosston Greater-Than-Zero regression model. Because the coefficients produced by the Rosston regression analysis are multiplied by the amount of programming minutes for each category, both models produce substantially lower results for JSC than what would be the case if Dr. Fratrik's weighted minutes were used.

intervals surrounding the Bortz results). Similarly, NAB's Proposed Findings contain no mention of the results of the Rosston regression analyses for the separate years 1998 and 1999, as determined by Dr. Crandall. *See* Crandall W.R.T. at 4-5. As discussed in paragraphs 148-50 of JSC's Proposed Findings, the volatility of the Rosston regression model prevents the use of the results of the Rosston regression analyses as "starting points" for the Panel's award determinations.

22. PTV contends that the implied PTV share generated by the Rosston Greater-Than-Zero regression analysis "could conceivably be as high as 11.5%" for the combined period of 1998 and 1999. PTV PFOF at ¶266. PTV ignores the fact that, with the wide confidence intervals produced by the Rosston regression analysis, PTV's implied share could conceivably be as low as 4.4% for that period. *See* JSC PFOF ¶150. Using the Greater-Than-Or-Equal-To-One regression analysis results, the low end of the confidence interval for PTV gives it a share of 2.9% for 1998 and 1999 - equal to PTV's unadjusted Bortz survey share. *See* Rosston W.D.T. at Appendices C & D (providing number of category minutes, coefficients, and standard errors for Greater-Than-Or-Equal-To-One regression analysis).

23. PTV provides no justification for receiving an award at the high end of the confidence interval for PTV. On the contrary, the evidence supports the conclusion that PTV's share should be on the *low end* of the confidence interval. As discussed above, PTV's share of minutes in the Rosston Greater-Than-Zero regression analysis greatly exceeds its share of weighted minutes in the Fratrik time study. *See* paragraph 20 *supra*.

24. PTV contends that the results of the Rosston regression analysis must be mathematically converted upward to arrive at PTV's share of the Basic Fund only. *See*

PTV PFOF ¶266. However, as pointed out in Dr. Crandall's rebuttal testimony, the Rosston regression model improperly associates 3.75% royalty payments with PTV programming when a cable system paying 3.75% royalties also carries a PTV distant signal. *See* Crandall W.R.T. at 8-9. Because of this error, PTV's share of the Rosston regression analyses is inflated in the first instance because PTV programming is associated with royalties it did not generate. *See id.* at 9.

25. Dr. Rosston also included a variable to account for the fact that systems subject to the 3.75% rate pay higher royalties. *See* Rosston W.D.T. at 10. If Dr. Rosston's 3.75% variable were effective, then no 3.75% adjustment would be necessary because that variable would *eliminate the effect of 3.75% royalties* on all programming categories. *See* Tr. 10228-29 (Crandall) (testifying that if the 3.75% dummy variable does take out the effect of 3.75% royalties, there are no biases for any program category). Accordingly, if Dr. Rosston's 3.75% variable worked, the Rosston regression analyses measured only Basic Fund royalties. If not, then Dr. Crandall's testimony shows that PTV's share is artificially high.

D. Nielsen Study

1. Relevance and Weight

26. The CARP in the 1990-92 Proceeding properly concluded that the unadjusted bottom-line Nielsen results do not equate with relative marketplace value. The CARP noted that the Nielsen study measures tuning rather than value, and thus required interpretation to be useful in measuring relative marketplace value. *See* 1990-92 CARP Report at 43. In the end, the CARP could not "quantify the Nielsen [study results] as evidence of market value other than to say that actual viewing is very significant when weighed with all other factors." *Id.* at 44. As discussed in JSC's Proposed Findings at

paragraphs 157-58, the CARP's holding was consistent with the decreasing weight given to the Nielsen study overall by the CRT. *See also* paragraph 5 at n. 1 *supra*.

27. Given the CARP's decision in the 1990-92 Proceeding, Program Suppliers have recognized that the results of the Nielsen study of distant signal viewing time cannot be used without adjustment. *See* PS PFOF at 157 ("But use alone does not constitute all the value in programming"). Rather, as shown in Dr. Gruen's testimony, the amount of viewing of particular programming may dramatically differ from the marketplace prices that can be obtained for that programming. *See* Gruen W.D.T. at Appendix A (tables of Nielsen ratings and license fees); Tr. 7630 (Gruen); *see also* JSC PFOF at ¶167, 249-50 (discussing the wide difference between viewing of JSC programming and marketplace value of JSC programming). Accordingly, the Program Suppliers have submitted "avidity" adjustments to the bottom-line viewing results in an attempt to show market value.

28. The results of the Nielsen study in this proceeding demonstrate that those results are heavily influenced by the amount of time occupied by the various programming types, rather than the relative value of those program types. Dr. Gruen acknowledges that NAB's, Devotional Claimants' and PTV's *viewing time* shares are mainly a function of their *programming time* shares. *See* Gruen W.D.T. at 31. Indeed, the bottom-line results of the Nielsen study of distant signal viewing time on a household basis differs little from the bottom-line results of the Fratrik study of distant signal programming time itself:

Comparison of Fratrik Time Shares And Nielsen Viewing Time Shares 1998-1999

Programming Category	Fratrik Study Weighted Time Share (1998-99)	Nielsen Study Viewing Time Share (1998-99)[9]
Program Suppliers/ Syndicated Series, Specials & Movies	60.38%	60.00%
Commercial TV/ Local	13.00%	14.70%
Public Broadcasting/ Non-Commercial	14.87%	15.98%
Sports	4.91%	8.45%
Devotional	2.94%	0.80%
Canadian	3.68%	N/A

Compare PS Exs. 20 & 22 (Nielsen viewing time study results) *with* NAB Ex. 10 at 13 (Fratrik time study results). The similarity of the results of the two studies – only the Sports category shows a significantly higher viewing time share than its time share – is further reason not to give any weight to the bottom-line results of the Nielsen study. As discussed in depth at paragraphs 189-191 of the JSC's Proposed Findings, to the extent that the Nielsen study is essentially a time measure, it is unhelpful in determining relative programming values.

2. Dr. Gruen's Adjustments

29. As noted above, Program Suppliers sought to respond to the CARP's determination that the Nielsen study is not a direct measure of relative marketplace value by offering certain adjustments to the Nielsen bottom-line results. Dr. Gruen's adjustments recognized that some viewing could be associated with higher value to cable operators than other viewing. *See* Gruen W.D.T. at 26-28 (contending that the 18-49

[9] The total household viewing minutes for 1998 and 1999 are drawn from PS Exhibits 20 and 22 to determine a combined Nielsen share for those years.

viewer demographic is more valuable to cable operators). He also attempted to adjust for the fact that the amount of available distant signal programming time had a significant impact on the amount of distant signal viewing time. *See id.* at 38 (adjusting viewing minutes by the viewing minutes per quarter hour ratio).

30. Dr. Gruen's adjustments (including those requested by the Panel) resulted in substantial changes to the various viewing time shares of the Nielsen study. While NAB's and PTV's adjusted shares were lower than their raw Nielsen study shares because their viewing time shares were attributable to their bulk amount of programming time, Program Suppliers' and JSC's shares increased. *See* JSC PFOF ¶173-78. Certain of these adjustments resulted in relative shares for the JSC in excess of 20% and even 30%-40% – an unprecedented level for JSC based on any analysis of the Nielsen viewing time data in cable royalty distribution proceedings. *See* JSC PFOF ¶241-42.

31. In their Proposed Findings, Program Suppliers offer a new set of adjustments to the Nielsen study. These adjustments are based on a comparison of the total Nielsen study viewing minutes for each program category to the total number of minutes for each programming category in the Rosston regression dataset. *See* PS PFOF at 171 and n.6. However, none of Program Suppliers' witnesses or any other witnesses support these adjustments, which also have never been subjected to cross-examination. Indeed, there is no record basis to support the conclusion that such adjustments are appropriate or are a meaningful measure of marketplace value. Accordingly, Program Suppliers' new, unsponsored adjustments should be rejected.

3. NAB/PTV Reliance Upon Unadjusted Nielsen Results

32. NAB and PTV offered substantial criticism of the adjustments offered by MPAA. PTV described Dr. Gruen's adjustments as "spurious," PTV PFOF at ¶276, and

argued that his reliance on the 18-49 demographic should be rejected, *see id.* at ¶290. Similarly, NAB described Dr. Gruen's adjustments as "flawed in both their conception and their implementation." NAB PFOF at ¶86. While NAB and PTV provided those criticisms, they do not propose their own methods of adjusting the Nielsen study shares of distant signal viewing time into measures of relative marketplace value. – as the CARP in the 1990-92 proceeding determined must be done.

33. Instead, both NAB and PTV attempt to use the unadjusted results of the Nielsen study in their own right to demonstrate relative marketplace value. NAB states that the NAB share of distant signal viewing minutes reflected in the Nielsen study is "powerful confirmation" of the relative marketplace value of NAB programming as reflected in the Bortz survey. *Id.* at ¶77. NAB contends that "[t]he significant change in the relative share of Commercial Television programming in the distant signal marketplace was even more emphatically demonstrated by the change in the Nielsen viewing study results." *Id.* at ¶217.

34. PTV is bolder (and self-contradictory) in its reliance on the unadjusted results of the Nielsen study of distant signal viewing time. PTV argues that, while distant signal viewing of Program Supplier programming is irrelevant to the relative marketplace value of Program Supplier programming, the PTV share of distant signal viewing minutes reflected in the Nielsen study *is relevant* to the relative marketplace value of PTV programming. *See* PTV PFOF at ¶474. PTV contends that its Nielsen share supports the conclusion that the relative marketplace value of PTV programming is at a "parity" level with Dr. Johnson's measure of adjusted distant subscriber instances. *See id.* at ¶¶255-56.

35. By placing their reliance on the unadjusted Nielsen study results, NAB and PTV contradict the CARP's ruling in the 1990-92 Proceeding that the unadjusted bottom-line results of the Nielsen study of viewing minutes do not equate with relative marketplace value. *See* 1990-92 CARP Report at 44. Ironically, that ruling was the product of, among other things, NAB and PTV's own advocacy in the 1990-92 and prior proceedings.

36. For example, NAB argued in its 1990-92 Proposed Findings that "[t]he MPAA viewing study provides no relevant measure of the marketplace value of programming in the cable distant signal marketplace." 1990-92 NAB PFOF at 145. In support of this argument, NAB referred to record evidence, stating:

> [T]he viewing numbers provided by the MPAA study are not at all the type of data that could be used by a cable operator to sell advertising or evaluate a distant signal. They are not ratings or share numbers, as those terms are used in the broadcast industry, and thus provide no comparative measure of how one station might do against another or the extent to which a signal or program is being viewed in relation either to potential audience or to the audience watching all available channels at the same time.

Id. at 146 (footnotes omitted). It concluded that "the MPAA viewing study provides no relevant measure of the marketplace value of programming in the cable distant signal marketplace." *Id.* at 145. NAB pointed to the testimony of its witness, Dr. Ducey, who testified that "viewing data are insufficient to determine what drives subscribers to cable," *id.* at ¶23, and that "viewing measures are not a good proxy for subscriber satisfaction or preference," *id.* at ¶24.

37. Similarly, PTV stated in its 1990-92 Proposed Findings that "the value of programming to cable operators cannot be measured by the number of hours of programming, or by the viewing levels achieved by that programming." 1990-92 PTV

PFOF at ¶124. PTV further stated that "[t]he Nielsen study does not address the criteria of relevance in this proceeding because it fails to measure either the benefits to cable operators from distant signal retransmission or the marketplace value of the retransmitted programming." *Id.* at ¶411 (citing Mr. Fuller). Like NAB, also supported its statements with references to the extensive record.

38. PTV followed up its opposition to the use of Nielsen study results in the 1990-92 Proceeding by submitting testimony from John Fuller in this proceeding. Mr. Fuller testified that "it is clear to me that the Nielsen study does not address the criteria of relevance to the Panel." Fuller W.D.T. at 20. He further stated that "the value of programming cannot be measured by the number of hours of programming, or by the viewing levels achieved by that programming." *Id.* at 22. He concluded that "Nielsen viewership data does not tell us what value a cable operator places on particular programming." *Id.* at 25.

39. PTV's attempted defense of its about face on the usefulness of the Nielsen study of distant signal viewing time rings hollow. PTV contends that Nielsen study results have "always" been used as a "starting point" in setting awards. *See* PTV PFOF at ¶473. However, the Nielsen study has not been described as a "starting point" since the 1979 Proceeding. In fact, the Nielsen study has not been a starting point because of the extensive criticism of Nielsen offered by PTV, NAB, JSC and Devotionals since 1979 and in particular in the 1989 and 1990-92 proceedings. *See* paragraphs 4-5, 36-37 and n.1 *supra.*

40. PTV's unavailing attempt to elevate Nielsen to a status it has not enjoyed in two decades is flatly contradicted by the CRT's 1989 Determination and the CARP's

1990-92 Determination. As discussed in JSC's Proposed Findings at paragraphs 157-58, both were heavily weighted towards the use of the Bortz survey results rather than the results of the Nielsen study. PTV's argument in its Proposed Findings that the Nielsen survey results can be used as support for the relative marketplace value of PTV programming would thus undo the very precedent PTV helped to create (and indeed, tried to perpetuate through the original testimony of Mr. Fuller in this proceeding).[10]

4. The Reliability Of The Nielsen Study

41. Both NAB and PTV fail to consider that the sizable change in the Nielsen study of distant signal viewing time towards NAB and PTV programs reveal a lack of reliability of the results of the Nielsen study. The consistency of the results of the Nielsen study over the years was one basis for the CRT's decision to give considerable weight to those results. *See 1983 Cable Royalty Distribution Proceeding*, 51 Fed. Reg. 12792, 12808 (Apr. 15, 1986) ("1983 CRT Determination") (noting that the stability of the results of the Nielsen study, notwithstanding the significant changes resulting from the FCC's elimination of the distant signal rules, "tends to give the Tribunal confidence that its results are reliable"). The very results that NAB and PTV now tout call that conclusion into question.

42. As noted by Mr. Lindstrom during his testimony, the results of the Nielsen study (which include a more than 12-point increase in PTV's share) do not coincide with

[10] Regardless of PTV's contention, Dr. Johnson himself indicated that respondents to the Bortz survey would have been aware of the relative amounts of viewing of various programming types when assigning relative values to the key constant sum question. *See* Tr. 9118 (Johnson). Thus, to the extent that the relative amount of viewing minutes are relevant at all, whatever value those minutes provide are reflected in the results of the Bortz survey.

what one would expect if simply the viewing of WTBS were eliminated from the 1992 Nielsen study. *See* Tr. 7264-65 (Lindstrom). Simply removing WTBS and WWOR from the 1992 Nielsen study (which had 15.2 million and 1.2 million viewing minutes, respectively, *see* NAB Ex. 15-X) would leave millions more viewing minutes than were actually measured in the 1998-99 Nielsen studies. The unexpected performance of the Nielsen study raises questions as to its reliability.

IV. THE SELLER'S PERSPECTIVE

43. The NAB Proposed Findings discuss the "seller's perspective" as if it is a critique addressed only to the JSC and the Bortz survey. *See* NAB PFOF at ¶¶119-126. Neither is the case. Each of the analytical studies presented in this proceeding is, by necessity, based to some extent in the distant signal market as it exists today, rather than the hypothetical free market. In past proceedings the CARP and the CRT have given less weight the results of the Bortz survey to account for their perception that in the free market the bargaining posture of a claimant group might be different than the results reflected by the survey. *See, e.g.* 1990-92 CARP Report at 65; 1989 CRT Determination, 57 Fed. Reg. at 15303; 1983 CRT Determination, 51 Fed. Reg. at 12811. For example, the CRT recognized that this "seller's perspective" was a reason to reduce the share allocated by the Bortz survey to the Devotional Claimants, stating that:

> [I]n 1989, the Bortz survey included the Devotional Claimants for the first time, and cable operators said they would allocate more than 4% of their budget to religious programs. Yet the 4% represented only the buyers' side. If cable operators went into the marketplace, would they find the price of devotional programs much cheaper, or even zero? . . . .
>
> We adjust the award for Devotional Claimants upward from 1.1% to 1.25%. This is still far below the Bortz survey result, because we believe that the price of such

> programs is much less than what the cable operator is willing to spend.

Id. at 15303.

44. As discussed in JSC's Proposed Findings, the seller's perspective adjustment is based on the theory that in the hypothetical free market, a "seller" might not demand the full price that a buyer would otherwise be willing to offer because the seller might have interests beyond simply being compensated for the retransmission. *See* JSC PFOF ¶¶ 299-314. As Dr. Crandall testified, the best evidence, from an economist's standpoint, of the relative free-market royalty shares are the unadjusted Bortz survey results. Tr. 10244 (Crandall). However, if the Panel follows precedent and adopts the seller's perspective adjustment, it should actually apply the adjustment to all of the studies to which it gives any weight by looking at the evidence of how each party would bargain and adjusting that party's share up or down accordingly.

A. The Seller's Perspective Applies To All The Quantitative Studies

45. The NAB's Proposed Findings focus on the application of the seller's perspective to the Bortz survey results. *See* NAB PFOF at ¶119. However, the premise that a seller might not bargain in the free market the same way they behave in the regulated market applies to all the studies that were introduced in this proceeding. The Rosston regression analysis purports to measure the contribution of a minute of programming in each category in the current distant signal marketplace to the payment of royalties at the current government-set rates. Rosston argues that the results of his regression can be applied to the royalty pool to approximate the way a free market would divide the royalties. *See* Rosston W.D.T. at 8. Because there is no "bargaining" in the regulated market upon which Rosston's model is based, his model assumes that there will

be no change when free bargaining is introduced. But the seller's perspective approach suggests otherwise.

46. The same can be said of the Nielsen study, which uses viewing in the government-regulated market to impute royalty shares in the hypothetical free market. In the free market, the value of that viewing might be differently assessed by the claimant groups. Thus, if commercial broadcasters were willing to accept a relatively low payment for a copyright license in the free market in return for getting additional advertising revenue as a result of the additional carriage, both the Rosston and Nielsen models would overestimate the share of royalties for commercial broadcasters. *See* Crandall W.R.T. at 9-10 (noting that Rosston regression subject to seller's perspective criticism); 1989 Crandall W.R.T. at 18 (D2:8) (stating that the Nielsen study "does not measure the effect that importation of the various program types would have on the price that copyright owners would demand.").[11]

B. <u>Free Market Structure And The Seller's Perspective.</u>

47. NAB's Proposed Findings confuse evidence presented by the JSC, particularly through Dr. Crandall, about the structure of the hypothetical free market on one hand and the seller's perspective on the other. *See* NAB PPOF ¶¶ 119-126. Dr. Crandall testified about whether one could predict how the buyer and seller would be

[11] In fact, there is more reason to apply the seller's perspective adjustment to the Rosston and Nielsen models than to the Bortz survey. The Bortz survey asks cable operators with experience in the programming marketplace about how they would divide a constant budget among the distant-signal program types they carry. To the extent that their answers include experience bargaining with the same sellers in the free market, that experience would be factored in to their responses to the Bortz questionnaire. By contrast, the Rosston and Nielsen models are based entirely on behavior in the regulated market and do not include any provision for the possibility that behavior in the free market might be different.

organized in the free market and whether it would be likely that the organization of the parties would make a difference to royalty distribution. *See* Crandall W.R.T. at 1-3 and Appendix A. Dr. Crandall showed that economic theory predicts that the potential bargaining power of the buyers' side and the sellers' side in the free market would be roughly the same as it is in the regulated market – in other words the two sides would organize to bargain in whatever way gave them the most advantageous bargaining position but the balance of relative power would not change. Because this balance of bargaining power is likely to be relatively constant, Dr. Crandall concluded that the structure of the hypothetical free market would be unlikely to change the distribution of royalties (and so the Panel need not resolve the hypothetical market structure) and that the Bortz results are therefore strongly predictive of the free market results. *See id.*

48. Dr. Crandall did not say, as NAB's Proposed Findings suggest, *see* NAB PFOF ¶ 122, that he could eliminate the possibility that sellers, such as the commercial broadcasters, would not exercise their full bargaining power because they were more interested in signal carriage than in copyright royalties. Rather, Dr. Crandall pointed out that if this Panel concludes that it should consider the likely bargaining interests of the various claimants in a hypothetical free market, the evidence would not support lowering the Bortz results for the JSC, but might support lowering them for other claimants including the NAB. *See* Tr. 10245-46 (Crandall).

C. Evidence of Seller's Perspective For Particular Claimants.

49. If the Panel follows precedent and applies the seller's perspective, it should do so by considering the evidence with respect to each party and adjusting the share result according to the evidence. There is evidence in this proceeding for the broadcaster claimants – NAB and PTV – that they would recognize other income streams

through retransmission and therefore might be willing to accept a lower price, just as there has been in past proceedings with respect to the Devotional Claimants. By contrast, the evidence with respect to the JSC, to the extent there is any evidence on this point, is that they are very hard bargainers.

1. NAB

50. NAB argues that there is "no evidence"" that commercial broadcasters would be willing to accept lower royalty payments than cable operators might be willing to pay. *See* NAB PFOF at ¶125. This claim is contrary to the record. Both the NAB and PTV supported legislative changes that had the effect of reducing the cable royalty fund, indicating a preference for carriage over compensation. *See* JSC PFOF ¶¶299-314, 350-53. The NAB has opposed the repeal of the compulsory license, *see* JSC Ex. 6-R, indicating that its members believe that they would receive *less* in compensation in the open marketplace than they do under the compulsory license regime, *see* Tr. 10256-57 (Crandall).

51. Finally, there was a significant amount of testimony regarding NAB's willingness to accept a deep cut in royalty payments for the distant retransmission of their programming. *See* JSC PFOF at ¶302-06. Had the $4.50 per month basic cable rate that NAB supported been in place during the 1998-99 period, the royalty fund would have been more reduced by more than 65%.[12] *See id.* at ¶305. JSC's proposed award for NAB

[12] NAB's Proposed Findings try to downplay this incontrovertible evidence by characterizing it first as "supposed support" for a reduction in the basic rate and then as an "unsupportable implication." NAB PFOF ¶ 126. In fact, it is difficult to imagine under the current CARP discovery rules, evidence more directly related to a party's seller's perspective. NAB's written commitment to cause a decrease in the copyright royalty fund in order to ensure broader carriage of NAB programming is direct and extremely probative evidence of NAB's perspective when it is "selling" programming. The undisputed evidence shows that NAB bargains hard for carriage but is willing to give

Footnote continued on next page

of 5.0% in 1998 and 5.1% in 1999 simply applies that seller's perspective – i.e., NAB's willingness to accept the royalties produced by a $4.50 royalty base – to the NAB's Bortz survey share. Indeed, JSC's proposed application of the seller's perspective is conservative and should be considered the high end of the zone of reasonableness for the NAB award; the NAB proposed a $4.50 rate at the time it was receiving 5.7% of the cable royalty fund – royalties that would equal only 1.9% of the 1998 fund. *See id.* at ¶306 (table showing range of potential NAB willing seller shares).

2. PTV

52. PTV recognizes that the ultimate question is "what would cable operators *have had* to pay in an open market for . . . [the] programming that existed" in 1998 and 1999. PTV PFOF at ¶464. There is also ample evidence that PTV would be willing to accept lower payment from cable operators in return for reaching more subscribers. As Mr. Wilson explained, PTV's goal of universal viewer access to public television is met when a cable system without a local PTV signal imports a distant PTV signal. PTV is not harmed by such an importation. *See* Tr. 9565, 9585 (Wilson). As such, Mr. Wilson testified that a PTV station would actually *want to be carried* into those communities where no local signal is present. *See* Tr. 9585 (Wilson). He testified that the principle of public access to PTV stations is more important than compensation for the carriage of those stations. *See* Tr. 9587 (Wilson). Before Congress, PTV relinquished any claim for retransmission consent in pursuit of its goal of universal carriage. *See* JSC Ex. 57-RX at

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Footnote continued from previous page
up royalty fees. The Tribunal and the Panel in the past have reduced shares based on the "seller's perspective" with far less probative evidence.

833. Accordingly, where a cable system carries no local PTV signal and might value the importation of a distant PTV signal, the clear inference is that the distant PTV station would agree to such carriage without requesting compensation from the cable systems. Given that 50% of the carriage of PTV distant signals (involving 23% of all distant PTV subscriber instances) involves such carriage, *see* JSC Ex. 24-X, there is a strong quantitative basis for reducing the PTV's share to account for the seller's perspective.

3. JSC

53. By contrast, there is no evidence in the record that JSC would be willing to accept less than cable operators would be willing to offer for JSC programming. All of the evidence is to the contrary – that JSC are very hard bargainers able to recognize substantial value for their programming in the free market. *See, e.g.,* Tagliabue W.D.T. at 3; Tr. 10246 (Crandall) ("They [JSC] have no particular interest in offering their programming at lower rates."); Tr. 390 (Trautman); NAB Ex. 6-X (referring to cable operator complaints about the high marketplace prices of JSC programming). As the testimony of James Trautman shows, JSC members have actually negotiated marketplace prices for their programming vastly disproportionate to the amount of time or viewing that programming produces. *See* JSC Ex. 1 at 17-24; *see also* JSC PFOF at ¶¶245-50.

V. EVIDENCE CONCERNING THE JOINT SPORTS CLAIMANTS

54. The parties making award proposals for the JSC – NAB, PTV, and the Canadian Claimants – recommend that JSC receive between 28.2% and 42.8% of the Basic Fund.[13] These recommendations represent awards that are generally the same as

[13] NAB recommends that JSC receive 42.8% of the Basic Fund and 47.7% of the 3.75% Fund. *See* NAB PFOF at 162-63 (Proposed Calculation Methods ¶¶11-12). PTV recommends that JSC receive an award in the range of 28.2% (unchanged from JSC's

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or much higher than JSC's award in the 1990-92 Proceeding. However, certain of the arguments made in an effort to devalue JSC programming are misleading or inaccurate.

A. JSC Programming On Fox

55. Both PTV and NAB recognize that the addition of compensable JSC programming to Fox stations carried as distant signals is a changed circumstance for the JSC's claim in this proceeding. *See* PTV PFOF at ¶631; NAB PFOF at ¶101. As discussed in the JSC's Proposed Findings at 268-274, for the first time, JSC are entitled to royalties for some of their most valuable programming – NFL football games, including the playoffs and the 1999 Super Bowl, Major League Baseball playoff and World Series games, and the NHL Stanley Cup Playoffs – in addition to regular season Games of the Week. *See* Tagliabue W.D.T. at 1-2; Tr. 579 (Trautman). PTV describes the addition of JSC programming to Fox distant signals as a "significant" changed circumstance. *See* PTV PFOF at ¶631. However, both NAB and PTV contend that the addition of JSC programming to Fox signals should not lead to an increase in the JSC's award. *See id.* at ¶632-33; NAB PFOF at ¶230.

56. PTV attempts to dismiss the carriage of Fox distant signals as "relatively small." *See* PTV PFOF at ¶631. PTV further contends that the value of carriage of JSC programming on a Fox distant signal is limited to circumstances in which the cable operator does not carry a local Fox signal. *See id.* However, PTV's contentions apply with equal force to PTV's claim. While only about 230 systems carry a Fox affiliate as a

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1990-92 share) to 34.8% of the Basic Fund. *See* PTV PFOF ¶¶624-26. Canadian Claimants set forth a royalty allocation method that would result in JSC being awarded 37.2% and 37.1% of the Basic Fund in 1998 and 1999, respectively, and 39.0% and 38.9% of the 3.75% Fund in 1998 and 1999. *See* Canadian PFOF at Appendices B, D.

distant signal, *see* Tagliabue W.D.T. at 6, that number not dissimilar from the number of systems carrying PTV as a distant signal, *see* PTV Ex. 15 (identifying 514 systems carrying PTV distant signals in 1998).

57. Moreover, while it is true that Fox distant signals may be most valuable where no local signal is carried, there are a significant number of instances where a distant Fox station provides a cable subscriber with different NFL games on a Sunday afternoon. *See* Tr. 136 (Tagliabue). Given that consumers are willing to pay $179 per year to access out-of-market NFL games, *see* Tagliabue W.D.T. at 5, the ability of cable systems to provide additional NFL games on distant Fox signals would be valuable. The "scheduling diversity" provided by distant Fox stations is similar to that touted by PTV as lending substantial value to its claim. To the extent that duplicative PTV signals represent "votes" for PTV programming and generate value for cable systems, so too would duplicative Fox signals.

58. Based on its own metric of subscriber instances and "parity," PTV contends that changed circumstances should result in a more than 6 percentage point increase in its award. Because Fox signals have about half the carriage of PTV signals, it is clear that the same arguments made by PTV would support a substantial increase in the JSC award based on the addition of JSC programming to Fox stations alone.

B. Carriage Of JSC Programming

59. PTV also contends that the amount of JSC programming on WGN was reduced between 1992 and 1998. *See* PTV PFOF at ¶¶96-97. However, as Dr. Ducey testified, JSC programming actually constituted a *greater* portion of the amount of compensable distant signal programming on WGN in 1998-99 than in 1990-92. *See* Tr. 8980-82 (Ducey).

60. PTV further argues that by 1998 "[MLB] was licensing substantially more games to regional sports networks." PTV PFOF at ¶95. However, the exhibit cited by PTV, NAB Exhibit 53-RX, shows that approximately the same number of baseball game telecasts were appearing on broadcast television in 1998 as in 1992. As Mr. Fuller testified, the games on broadcast television would not be shown on regional sports networks, and that to see all of a team's games, a subscriber would need to have access to both sources. *See* Tr. 9867 (Fuller). Mr. Egan testified that this exclusivity makes sports programming highly valuable to cable operators and is the type of factor that motivates consumers to subscribe to cable. *See* Egan W.D.T. at 4.

61. The issue of the rise of regional sports networks ("RSN's") was raised by the Program Suppliers in the 1990-92 Proceeding and discussed by the CARP in its report. *See* 1990-92 CARP Report at 96-98. However, the JSC noted, as they do here, that the packages available on RSN's were distinct from those available on distant signals. *See id.* at 96. In the end, the CARP did not discuss the RSN issue in making its award to JSC and found overall that "circumstances have changed in favor of JSC." *Id.* at 100.

62. In addition, PTV notes the addition of ESPN2 – a single channel - to the cable network universe between 1992 and 1998 and states that "when evaluating the additional benefit of a distant signal with sports, a cable operator would have to take into account that its cable system likely already carries ESPN and ESPN2." PTV PFOF at ¶94. Beyond the fact that PTV again misses the exclusivity of game telecasts, the addition of a single channel pales in comparison to the number of PTV-look alike channels added between 1992 and 1998. Dr. Thompson identified a number of cable

networks that provide programming that is similar or identical to the programming that appears or has appeared on PTV in his testimony; many of those began carriage after 1992. *See* Tr. 8198-8201 (Thompson); JSC Ex. 45-X (identifying dates of first carriage for cable networks).

C. PTV's Joint Program Supplier/JSC Award Proposal

63. In its Proposed Findings, PTV contends that JSC and Program Suppliers should be given a "joint award" in this proceeding. *See* PTV PFOF at ¶¶634-639. PTV bases this recommendation upon the fact that Program Suppliers and the JSC have "widely divergent Nielsen and adjusted Bortz results." *See id.* at ¶634. In PTV's estimation, these "widely divergent" results support a more precise estimate for a *combined* award than individual awards. *See id.*

64. PTV's proposal is misguided. There is no precedent for, in effect, joining two different Phase I categories together to make a combined award to both. Rather, the precedent tends towards the opposite direction; while NAB originally received an award for both U.S. and Canadian commercial broadcaster claimants, the Canadian Claimants were split off the NAB claim in the 1979 Proceeding in recognition of the fact that their claims were different than the claims made by U.S. commercial broadcasters. *See* 1979 CRT Determination, 47 Fed. Reg. at 9894.

65. The very reason PTV cites for combining the award of JSC and Program Suppliers - the "widely divergent" Nielsen and Bortz shares for the Program Suppliers and JSC - counsels against such a combination. Those "widely divergent" Nielsen and Bortz shares are attributable to the fact that the two claimant groups represent radically different programming that has radically different value to cable operators. While Program Supplier programming accounts for the bulk of the distant signal programming

cable operators retransmit, that bulk is valued differently from JSC programming, which takes up a comparatively small amount of distant signal programming time. *See* NAB Ex. 10 at 13 (Fratrik time study results). As discussed in JSC's Proposed Findings at paragraphs 224-226, JSC programming is distinguishable from all other programming types in that its marketplace value – as shown in the Bortz survey and actual marketplace transactions involving JSC programming – far exceeds either its programming time or viewing time shares.

66. PTV's proposal to create, for all intents and purposes, a single award for a new JSC/Program Suppliers category is also inappropriate from a precedential standpoint. If the Panel were to make a single award to JSC and Program Suppliers, such an award would leave no basis for a future CARP to determine the "changed circumstances" for either the JSC or the Program Suppliers. As such, neither JSC's nor the Program Suppliers' award should be limited as a result of the award given to the other. Instead, the Panel should review the evidence of the relative marketplace value of each claimant group's programming independently and arrive at separate awards that bear no relationship to any "cap" on a total award to the JSC and Program Suppliers.

VI. EVIDENCE CONCERNING COMMERCIAL TV CLAIMANTS

A. Significance Of NAB Claim

67. NAB requests an award of 17.33% of the Basic Fund and 19.31% of the 3.75% Fund. *See* NAB PFOF at 162-63 (Proposed Allocation Calculation Methods, ¶¶11-12). Given that the Basic Fund accounts for approximately $100 million in both 1998 and 1999 and the 3.75% Fund accounts for approximately $10 million in each year, *see* Hazlett W.D.T. at 25, 31, NAB requests more than $19 million per year in royalties.

68. NAB's Proposed Findings focus on the WTBS conversion, but the award NAB proposes bears no relationship to any change in the royalty fund caused by that conversion. NAB's request far exceeds, on a dollar basis, what its 1990-92 award would be in the year before the WTBS conversion, 1997. In the 1990-92 proceeding, NAB received an award of 7.1625% of both the Basic and 3.75% Funds. *See Distribution of 1990, 1991 and 1992 Cable Royalties*, 65 Fed. Reg. 55653, 55669 (Oct. 28, 1996). Because the cable fund equaled approximately $148.5 million in 1997, *see* Johnson W.D.T. at 5, NAB's 1990-92 award would have equaled $10.6 million. NAB thus effectively seeks a more than 80% increase in its 1990-92 actual dollar award as a result of the WTBS conversion.

69. NAB seeks the increase in its dollar award despite the fact that it is the source of *less* distant signal programming in 1998-99 than was the case when its 1990-92 award was established; moreover, the programming it claims for in 1998-99 is more heavily slanted towards the type the CRT found (and NAB acknowledges) to be less valuable. NAB further seeks this increase despite the fact that it supported legislative efforts that caused substantial reductions in the Basic and 3.75% Funds. Given such record evidence, not only should NAB's dollar award be reduced, its percentage award should also be cut.

1. NAB Programming On WTBS And WWOR

70. The record shows that, despite NAB's attempt to portray the WTBS conversion as an unmitigated benefit to its claim, NAB actually lost a significant amount of programming to its claim when WTBS converted into a cable channel and WWOR lost its satellite carriage. As shown in JSC Ex. 7-X, almost 40% of NAB's programming in

1992 was attributable to WTBS and WWOR – programming that effectively disappeared from the distant signal marketplace.

71. With respect to the WTBS conversion, NAB implies that WTBS was weighted more heavily towards Sports programming than station-produced programming. NAB PFOF at ¶12-13. To reach that conclusion, however, NAB impeaches Dr. Fratrik's time study; NAB points to the Nielsen viewing study in 1992 in contending that only 4% of WTBS' programming was station-produced. *See id.* at ¶12. On the other hand, Dr. Fratrik's time study – cited by Dr. Ducey in his direct testimony – shows that NAB programming accounted for 6.2% of WTBS's programming schedule. *See* NAB Ex. 6. That percentage exceeded the percentage attributable to JSC programming and Devotional Claimants programming. *See id.*

72. NAB also contends that Program Suppliers and JSC "featured" the amount of their programming on WTBS in the 1990-92 Proceeding. *See* NAB PFOF at ¶13. Despite NAB's attempt to single out Program Suppliers and JSC, NAB itself placed an emphasis on WTBS programming in the 1990-92 Proceeding. NAB's 1990-92 Proposed Findings state:

> WTBS, by far the most widely carried superstation and the only station programmed to be a national rather than local station, produced a number of station-produced programs that would be of interest to viewers all over the country. Dr. Ducey testified that the station-produced programs actually produced for and broadcast by WTBS had many of the most highly ranked attributes in the WTBS image study. These programs included pregame and other sports programs, a weekly national and international news program called "Good News," environmental news programming, public affairs discussion shows, wrestling programs, and a variety of specials. In addition, WTBS produced a number of newsbreaks – "News Watch," "Sports Watch," "Fashion Watch," "Medical Watch," and

> "Kids Beat." These newsbreaks covered a variety of topics and were broadcast frequently and at various times during the day.

1990-92 NAB PFOF at ¶201.[14] NAB also sponsored a witness, Dr. Ducey, who testified about the NAB programming on WTBS (and, for that matter, the NAB programming on WWOR). *See* 1990-92 Ducey W.D.T. at 17-21 (D3:16). Accordingly, NAB's implication that it did not "feature" the value of its WTBS programming in the 1990-92 Proceeding is misleading.

73. The record evidence thus demonstrates that the NAB represents significantly less programming than in 1992. Without evidence that the remaining NAB programming is *more* valuable, the NAB overall dollar award should be reduced. As discussed below, however, the remaining NAB programming is substantially *less* valuable than the 1992 NAB programming.

2. NAB Programming Time

74. NAB correctly points out that "[t]he measure of program time by itself does not provide a measure of the relative marketplace value of the various program categories in 1998-99." NAB PFOF at ¶23. Nevertheless, NAB tries to argue that a change in that irrelevant measure can indicate a change in relative marketplace value.

75. The logical flaw in NAB's argument is exposed in its statement that the Fratrik time study shows what "the Form 3 cable operators actually chose to buy." *See id.* at ¶21. Cable operators, however, cannot choose whether to buy specific programs on

[14] NAB made considerable efforts in the 1990-92 Proceeding to classify certain WTBS-produced wrestling shows and a show titled National Geographic Explorer as NAB programming. *See* 1990-92 NAB PFOF at ¶¶81-83, 132-33. It further pursued the issue before the Librarian in its Petition for review, arguing for the inclusion of those WTBS programs in it its Nielsen viewing share. *See* 1990-92 Librarian Determination, 61 Fed. Reg. at 55664.

a distant signal, they must buy the signal as a whole. As Trygve Myhren testified in the 1990-92 Proceeding, if he could have arranged it, he would have instructed his cable system operators to carry only the sports programming on distant signals, *see* 1990-92 Myrhen W.D.T. at 3 (D5:30), thus making all of the other programming time valueless, whether its bulk increased from one year to another. Indeed, NAB's argument in this regard contradicts the regression analysis put forward by Dr. Rosston, which revealed a *negative* value to an increase in the amount devotional programming. *See* Rosston W.D.T. at 23. As Dr. Ducey admitted, an increase in the amount of NAB's programming time does not necessarily lead to an increase in value. *See* Tr. 8983 (Ducey).

76. Moreover, NAB's reference to the increase in the relative amount of NAB programming time ignores the fact that not all of that time is of equal value. As discussed in JSC's Proposed Findings at paragraphs 321-22, approximately 60% of the NAB programming that remains after the loss of WTBS and WWOR is superstation news and public affairs programming. The CRT found this programming to be of little value outside the broadcast station's region. *See* 1983 CRT Determination, 51 Fed. Reg. at 12811. The 60% level of superstation news and public affairs programming represents a dramatic shift in the NAB programming category. In 1992, the NAB programming category was made up of about 25% superstation news and public affairs programming. *See* JSC Ex. 11-X. As shown in JSC Exhibit 12-X, the entire increase in the relative amount of NAB programming time between 1992 and 1998 was attributable to the increase in superstation news and public affairs programming. *See* JSC Ex. 12-X. In fact, the amount of non-superstation news and public affairs programming actually decreased between 1992 and 1999. *See id.*

77. The CRT held that the same kind of "changed circumstances" NAB now relies upon did not increase the value of NAB's claim. In the 1980 Proceeding, the CRT specifically held that an increase in the time devoted to news programs was not of "decisional significance" to justify an increase in the NAB's award. *See* 1980 CRT Determination, 48 Fed. Reg. at 9565.

B. Cable Operator Testimony

78. NAB pulls short excerpts from the testimony of several cable witnesses in an attempt to highlight the value of NAB programming. *See, e.g.,* NAB PFOF ¶¶47-57. However, those brief excerpts must be seen in the context of their testimony as a whole; the same cable operators either focused their testimony on the value of JSC programming or agreed that JSC programming had greater relative value than NAB programming.

79. NAB cites Mr. Egan's statement that both the sports programming and news programming were valuable in bringing New York City stations to upstate New York cable systems, and that Baton Rouge news and public affairs programs would be of interest to cable subscribers in rural Louisiana. *See* NAB PFOF ¶¶48-49. However, the clear import of Mr. Egan's testimony was that sports programming is the most valuable programming on distant signals carried by cable operators. He stated that sports programming is unique and appeals to a set of highly motivated and loyal set of cable customers, and that it is generally exclusive to a particular source, meaning that a sports fan must subscribe to cable to have access to the sports programming available on distant signals. *See* Egan W.D.T. at 4-5. Mr. Egan found that an allocation of 40% of a cable operator's distant signal programming budget to sports programming was consistent with his experience in the cable industry. *See* Tr. 1286-87 (Egan). He stated that while there is value to most of the programming brought in on distant signals, sports programming is

the most highly valued, consistent with the results of the Bortz survey. *See* Tr. 1420 (Egan).

80. NAB also cites Mr. Maglio's testimony in the 1990-92 Proceeding that a cable system was likely to retain distant signals that originated in large markets or state capitals because those signals presented news programming that would be of interest to local cable subscribers. *See* NAB PFOF at ¶51. However, Mr. Maglio testified that sports programming was the most important reason to keep a distant signal: "In the majority of cases, the paramount consideration in determining whether to retain any [distant] signal was the presence of sports programming on that signal." 1990-92 Maglio W.D.T. at 8 (D5:28). Mr. Maglio further stated that "where the 3.75 fee was paid, it was paid principally to ensure subscriber access to the sports programming on superstations and other distant signals." *Id.* at 12.

81. Similarly, NAB excerpts Mr. Maglio's example of one system deciding to bring a distant signal from Indianapolis to southern Indiana to provide subscribers with some station-produced news programming, Mr. Maglio. *See* NAB PFOF at ¶51. However, Mr. Maglio's testimony provided a more powerful example of why sports programming is the most highly valued programming on distant signals:

> We actually dropped [distant signals with sports] in a couple of places. We found our offices picketed. There were bumper stickers in Hanford, California that said, "No Cubs, no cable. What had happened was this wasn't all theory.

1990-92 Tr. 1845 (D6:8). Mr. Maglio testified that his cable company's research showed that the presence or absence of sports should dictate whether a distant signal is kept or eliminated. *See id.*

82. NAB cites the testimony of Trygve Myhren in the 1990-92 Proceeding for his statement that news programming on a Seattle station would be valuable to the surrounding counties in Washington state. *See* NAB PFOF at ¶55. Mr. Myhren testified, however, that the sports programming is what cable operators are interested in when they carry distant signals, stating that "[i]f it could have been arranged, I would have preferred that my cable operators purchase only the sports on distant signals, and not carry the movies and syndicated programs at all." 1990-92 Myhren W.D.T. at 3 (D5:30). He testified that "the sports programming on distant signals . . . particularly given its real-time, perishable nature, has a deep appeal to subscribers who value sports. It clearly motivates potential subscribers to sign up and existing subscribers to continue subscribing." *Id.* at 4.

83. NAB also cites one line from Ms. Allen's testimony in which she stated that "one of the reasons we carry news programming and documentary programming" is that cable operators want to reach people with an interest in learning. *See* NAB PFOF at ¶57. The bulk of Ms. Allen's testimony, however, focused on the value of sports; she stated that stated that "live professional and collegiate team sports programming on distant signals was the single most valuable type of distant signal programming [in 1998 and 1999]." Allen W.D.T. at 4. She further testified that "[t]he sports programming on WGN is the most significant reason that cable operators have imported WGN." *Id.* at 5.

84. NAB also cites the testimony of Philip Viener in the 1989 Proceeding, in which he talked about the value of carrying a 10:00 o'clock news program from WTTG

in Washington, D.C. to subscribers in Virginia. *See* NAB PFOF at ¶54.[15] Despite this testimony about the value of news programming, Mr. Viener found that the JSC's share in the Bortz survey to be a reasonable reflection of how cable operators valued the various types of programming. *See* 1989 Tr. 2819-20 (Viener) (R2:4). The 1989 Bortz survey showed a value for sports 20 percentage points higher than for NAB programming. *See* JSC Ex. 1 at 26.

85. In addition, NAB cites the testimony of Robert Wussler, who testified about the value of JSC programming. *See* NAB PFOF at ¶56. NAB then cites the testimony of *Dr. Ducey* (not Mr. Wussler) to suggest that NAB programming has the same qualities as JSC programming. However, there is no reason to believe that Mr. Wussler would equate the two types of programming in value; he testified that "live sports programs are critically important to the cable industry's principal objective – convincing customers to subscribe to, and to continue to pay $15 to $30 per month for, cable service." 1989 Wussler W.D.T. at 3 (D5:27).

C. Prior Increases In NAB Award Despite WTBS Growth

86. NAB put its claim into the proper perspective when it stated that "[o]ver the past six litigated proceedings, the CRT and the CARP have adopted significant upward changes in the shares of the Commercial Television Claimants and downward changes [in the share of] Program Suppliers." *See* NAB PFOF at ¶211. This movement reveals the basic flaw in the NAB's WTBS-based arguments – NAB received substantially increased awards from the CRT and the CARP from the 1978 Proceeding

[15] However, Mr. Viener also testified that one of his cable systems dropped WTTG. *See* 1989 Tr. 2832-33 (Viener). That portion of Mr. Viener's testimony was designated into the record as a part of the NAB's July 25 designations.

through the 1990-92 Proceeding despite the substantial growth of WTBS. As Dr. Ducey rightly conceded, the same arguments raised by NAB in this proceeding possibly would have produced a decline in NAB's share in prior proceedings. *See* Tr. 1973 (Ducey).

87. Dr. Ducey's concession underscores the primary reason why the time-based and instances of carriage-based arguments advanced by the NAB (as well as PTV) are not relevant in determining changed circumstances for the various claimants. While it may be true that the total number of instances of superstation carriage may be lower in 1998 than in 1992, those numbers remain higher than in 1978, or in many of the earlier litigated years. *See* JSC PFOF at ¶204. Accordingly, a consistent use of the very arguments advanced by NAB in this proceeding would necessitate using a lower royalty award in the 1990-92 Proceeding as a "base" for determining changed circumstances.

88. A close review of the CRT and CARP's determination of the NAB's royalty awards in the litigated proceedings between 1978 and 1990-92 reveal that the NAB's increasing awards have been primarily attributable to the greater weight given to cable operator constant sum surveys rather than time and volume-based measures such as instances of carriage or weighted shares of distant signal programming time. In setting the NAB's award in the 1983 Proceeding, the CRT referred to the fact that it was giving some weight to the ELRA constant sum survey of cable operators sponsored by NAB. *See* 1983 CRT Determination, 51 Fed. Reg. at 12812 (raising the NAB's allocation to 5%). Similarly, in the 1989 Proceeding, the CRT specifically referenced the greater weight it was giving to the Bortz survey when it increased the NAB's award from 5.0% to 5.7%. *See* 1989 CRT Determination, 57 Fed. Reg. at 15303. In the 1990-92 Proceeding, the CARP raised the NAB's award based on its judgment that NAB's

programming was previously undervalued. *See* 1990-92 CARP Report at 112. Given the CARP's finding that there were no changed circumstances for the NAB, *see id.*, the only basis for increasing the NAB's award was the comparatively greater weight placed on the Bortz survey results by the CARP.

89. For this reason, the Panel should look to the best evidence of the relative value of NAB programming – the Bortz survey – in setting the NAB's award, rather than referring to any time or volume-based measures that were irrelevant in setting that award in the past. The Panel should then adjust the NAB's Bortz survey share to account for the significant incentives for NAB claimants to accept less than what cable operators are willing to pay for their programming.

VII. EVIDENCE CONCERNING PTV CLAIMANTS

A. Significance Of PTV Claim

90. PTV's claim for 12% of the Basic Fund is tantamount to a request for $12 million per year, given a Basic Fund of approximately $100 million in 1998 and 1999. This would represent an increase of almost $6 million per year over PTV's 1990-92 award as applied to the 1997 Basic Fund – they year before the WTBS conversion. *See* Johnson W.D.T. at 5, 7 (calculating a $6.3 million award in 1997 - 5.5% of an approximately $115 million annual Basic Fund). PTV requests this significant increase despite a lack of evidence that cable operators place any significant additional value on PTV programming and that, according to PTV's own metrics, PTV programming had less appeal in 1998-99 than it did in 1990-92.

91. The record evidence shows that cable systems paid approximately $2.6 million each year to carry PTV signals. *See* Martin W.D.T. at 9 (showing fees-generated of $1.3 million for the first half of 1998). PTV requests an award that is approximately

four times that amount. The Bortz survey results, as adjusted to account for PTV-only and Canadian-only systems, shows that cable operators value PTV distant signals at a level roughly equal to what they pay for those signals. *See* Trautman W.R.T. at 8 and Table 3. In requesting an award of 12%, PTV thus must demonstrate that its programming provides value to cable operators vastly disproportionate to the amount they pay for that programming, and vastly disproportionate to how cable operators themselves say they value PTV signals. PTV's Proposed Findings fall far short of that showing.

1. Limited Nature Of PTV Claim

92. PTV's Proposed Findings fail to convey the very limited nature of PTV's claim in this proceeding. While PTV devotes almost 60 paragraphs of its Proposed Findings to the quality and uniqueness of PTV programming, *see* PTV PFOF at ¶¶340-74, 384-429, those Proposed Findings contain almost no context for the way cable operators deliver that programming. The vast majority of cable systems (77%) representing the vast majority of subscribers (85%) carried no distant PTV signals in 1998 and 1999. *See* JSC Ex. 24-X. Of the remaining 23% of cable systems representing the remaining 15% of subscribers, about half, representing the vast majority of the remaining subscribers (72%), carried a distant PTV signal in addition to a local PTV signal. *See* JSC Ex. 24-X; PTV Ex. 16. As PTV calculates, only about 4% of all cable subscribers receive a distant PTV signal as their only PTV signal. *See* PTV Ex. 16. Thus, to the extent that PTV programming may be unique and valuable, cable operators receive that value largely through carriage of local PTV signals.

93. Given the largely duplicative nature of what limited PTV distant carriage there is, it is no surprise that cable operators place a relative value on PTV programming

roughly equal to what they pay for those signals. As PTV notes in its Proposed Findings, more than 60% of a PTV station's programming is provided by the National Programming Service, *see* PTV PFOF at ¶362, meaning that the majority of a second PTV signal's programming lineup would be merely cumulative of what is already carried. As PTV concedes, the importation of a distant PTV signal is most important when no local PTV signal is carried. *See id.* at ¶¶ 375-81. Indeed, in the 1990-92 Proceeding, Mr. Fuller estimated that the carriage of a duplicative second PTV signal would be worth less than half of a first PTV signal. *See* 1990-92 Fuller W.D.T. at 24-25 (D4:19).

2. Decline In Value Of PTV Programming

94. Also contradicting PTV's request for an increase in its dollar award is the decline in the value of PTV programming from 1990-92 according to PTV's own metrics. PTV trumpets the fact that 4.6 million households contributed to PTV in 1998 and 1999, stating that the number of contributors is "powerful evidence of their avid interest in [PTV] programming." PTV PFOF at ¶ 430. However, that number represented a substantial decline from the 5.2 million households contributing to PTV in 1990-92. *See* JSC PFOF at ¶356. Thus, to the extent that the number of households contributing to PTV is "powerful evidence" of public avidity for PTV programming, the substantial decline in that number from 1990-92 should also be "powerful evidence" of the decline of public avidity for PTV programming.

95. Similarly, the total audience for PTV programming experienced a significant decline between 1992 and 1998. Mr. Wilson described the amount of cumulative viewing of PTV as an important measure of PTV's success and agreed that "cumes" are a "very important statistic" to PTV. Tr. 3210-12 (Wilson). Ms. Lawson

testified in the 1990-92 Proceeding that PTV's cumulative ratings are tools for assessing how PTV is reaching its intended audience. *See* 1990-92 Tr. 4738 (Lawson) (R2:8). PTV trumpeted its high cumulative viewing number in its 1990-92 Proposed Findings, stating that PTV's cume rating represent a "large national audience . . . comprised of many smaller audiences of relatively avid viewers." *See* 1990-92 PTV PFOF at ¶288. As described in paragraph 355 of JSC's Proposed Findings, the cumulative viewing of PTV programming on a monthly basis – a measure of the number of unique individuals watching PTV programming – has decreased from 1992 to 1998. That decline is consistent with PTV's overall decline in ratings since 1992 from 2.0 to 1.7. *See* Tr. 3083-86 (Wilson).

96. Rather than introduce new evidence of the value of PTV programming, PTV presented the results of a 16-year-old survey of viewer beliefs about PTV programming. *See* Tr. 9826 (Fuller). In its Proposed Findings, PTV stated that this survey demonstrates that PTV programs "had more 'appeal' to viewers and that higher rated commercial programming, such as police dramas, game shows, and comedies, had the lowest appeal." PTV PFOF ¶436. However, that 16-year-old study cannot contradict the current evidence that PTV programming declined in value from 1992 to 1998.

97. Along the same lines, PTV devotes much efforts to compare its programming to the program "attributes" found to be popular among viewers in a WTBS study introduced into evidence in the 1990-92 Proceeding. *See id.* at ¶¶117-22. This study showed that viewers valued "high quality programs," and "limited commercial interruptions" as well as "programs the whole family can watch." *See id.* at ¶120. PTV

then argues that because its programs fit within these categories, its programming must be valuable to cable subscribers, and, in turn, cable operators. *See id.* at ¶123.

98. PTV's citation of the WTBS viewer study, however, adds no evidence of the value of PTV programming. In addition to being a dated study – it was raised and given whatever weight it was due by the CARP in the 1990-92 Proceeding – the main attributes popular with subscribers were merely platitudes that nearly every viewer would agree are important. It is doubtful that viewers would rate "low quality programs" over "high quality programs" or express a preference for "extensive commercial interruptions." *Cf.* Tr. 3383-84 (Fuller) (agreeing that it would be unlikely for respondents to say they did not prefer high quality programs). It is probably likely that respondents would place similar high values on programming that "could help you make money," or "provides information on keeping fit," attributes that could easily be associated with real estate moneymaking or fitness equipment infomercials.

99. PTV's effort at recycling old viewer studies highlights the relative lack of evidence adduced by PTV as to the change in value of its programming between 1992 and 1998-99. By contrast, PTV focused on significant changes in the PBS programming service in the 1990-92 Proceeding, referring to the years 1990-92 as "watershed" years that were characterized by programming initiatives that *increased* the value of PTV programming. *See* 1990-92 PTV PFOF ¶378-79, 383-84 (referring to "watershed" years for PTV and the increased visibility and appeal of PTV programming in those years). No similar argument is made in PTV's Proposed Findings in this proceeding. On the contrary, as discussed above, the qualitative measures PTV itself uses show a decline in the appeal and value of PTV programming.

3. Decline In Fully Distant PTV Carriage

100. PTV contends that "PTV's instances of carriage increased from 539 in 1992 to 587 in 1998 and 603 in 1999." PTV PFOF at ¶228. However, PTV's statement does not tell the whole story about PTV distant carriage. In fact, PTV signals showed an absolute decline in the amount of fully distant instances of carriage between 1992 and 1998, from 430 instances in 1992 to 398 in 1998. *See* Hazlett W.D.T. at Appendix D. Whereas 395 cable systems carried a fully distant signal in 1992, only 370 did so in 1998. *See* Tr. 3536 (Fuller). This decline occurred not because of conversion of PTV signals into cable networks (a la WTBS) or because of the loss of satellite carriage (a la WWOR), but because cable operators showed a reduced interest in carrying distant PTV signals.

101. The entire increase identified by PTV involves the carriage of *partially* distant signals. As shown in Dr. Hazlett's Appendix D, the number of partially distant PTV signals increased dramatically between 1992 and 1997 – from approximately 110 to 190. As such, partially distant signals account for more than 30% of PTV's overall distant carriage. *See id.* (187 of 585 in 1998). In this regard, PTV's statement that "the evidence does not show a significant increase in carriage of PTV distant signals at the time the must-carry rules went into effect," PTV PFOF ¶235, is directly contradicted by the record. PTV never provides an explanation for the nearly 100 additional partially distant instances of carriage between 1992 and 1998 other than the imposition of must-carry rules. The explosion in the number of partially distant signals is likely due to the must-carry rules, not because of any voluntary "votes" by cable operators.

102. PTV contends in its Proposed Findings that "[i]t is not possible, however, to discern from data on partially distant carriage whether a particular cable system's

headend is within or without a broadcaster's local must-carry area." PTV PFOF at ¶81. PTV cannot deny, however, that the prior FCC must-carry rules required carriage of all PTV stations that were local to *any community* served by the cable system. *See* 47 C.F.R. §§ 76.57(a)(3), 76.59(a)(2) & 76.61(a)(2) (1976). That would mean that all the partially distant signals under the old FCC rules would have been must-carry signals for the cable operators, who by definition, were providing the signal to customers with a local service area. Because the 1992 Cable Act required all cable systems to continue to carry or reinstate all of the PTV stations they were carrying as of March 29, 1990, many stations that were must-carry under the old rules would continue to be must-carry stations. *See* 47 C.F.R. § 76.56(a)(5). Thus, PTV's hypertechnical argument that some of the partially distant instances of carriage theoretically may not have been the result of must-carry rules rings hollow.

4. Impact Of WTBS Conversion On PTV Award

103. PTV's Proposed Findings are filled with references to the WTBS conversion. *See, e.g., id.* at ¶¶58-65. PTV states that "the conversion of WTBS resulted in a significant and quantifiable shift in the types of distant signal programming that cable operators collectively made available to their subscribers, with the relative value of PTV programming, which was not carried on WTBS, increasing compared to the program categories carried on WTBS." PTV PFOF at 1 (Introduction and Summary). However, PTV never explains why the WTBS conversion means that PTV should receive an award that would result in an increase in PTV's total *dollar* award. As Dr. Johnson himself indicated in his testimony, an award of 7.0% of the Basic Fund in 1998 and 6.7% of the Basic Fund in 1999 would "leave PTV in about the same dollar position as without the WTBS departure." Johnson W.D.T. at 7. Even if the Panel were to take Dr. Johnson's

calculations at face value, PTV would need to point to more than simply the WTBS conversion to justify its requested 12% award, which would increase its dollar award by more than 50%.

104. More fundamentally, PTV should not be immune to the overall reduction in royalties caused by the WTBS conversion. As the Librarian discussed in reviewing the CARP's determination, PTV was awarded more than 2½ times the amount of royalties paid for carriage of PTV signals in the 1990-92 Proceeding. *See* 1990-92 Librarian Determination, 61 Fed. Reg. at 55663. As Dr. Johnson conceded, the award royalties in excess of PTV's fee-generated share meant that commercial programming claimants received less than what cable operators paid for carriage of commercial signals – which would include WTBS. *See* Tr. 9141 (Johnson). Since WTBS accounted for more than 45% of the Basic Fund royalties generated by the carriage of commercial signals, *see* 1990-92 CARP Report at 9, it cannot be denied that a substantial portion of PTV's royalty award in the 1990-92 Proceeding was attributable to cable operator carriage of WTBS.[16] PTV should not both share in the royalties paid for carriage of WTBS and be immune from a decrease in its dollar award when those WTBS royalties disappear.

[16] Based on the CARP's finding that PTV signals generated 2.1% of the Basic Fund in 1992, *see* 1990-92 CARP Report at 9, the remaining 3.4% of the PTV award in 1990-92 would have been attributable to the royalties paid for carriage of commercial signals. Mathematically, WTBS' generation of 45% of the Basic Fund would mean that PTV received 1.5 percentage points of its 5.5% award (more than 25%) from the royalties generated by WTBS – more than $2 million in 1992 alone. Subtracting PTV's share of the WTBS royalties from Dr. Johnson's "same dollar position" calculation would consequently reduce the award necessary to keep PTV in the same dollar position by a similar proportion.

105. PTV should not receive an increase in its award due to the "fall" of WTBS because it did not suffer a commensurate decrease in its award during the "rise" of WTBS. Over the period 1978 through 1992, there was a significant increase in the carriage of superstations, including WTBS, WWOR and WGN. *See* Tr. 3781-83 (Johnson). Despite this increase, PTV's award remained at relatively the same levels, between 4% and 5.5%. *See* Tr. 3784 (Johnson). Indeed, PTV's arguments in the 1983 Proceeding focused on convincing the CRT to *ignore* the rise of WTBS in setting PTV's award. *See* 1983 PTV PFOF at 41-42 (arguing that WTBS was different from other distant signals and should be excluded from consideration).

106. Accordingly, because (a) PTV shared in the royalties generated by carriage of WTBS and (b) PTV's award was not affected by the rise in importance of WTBS as a distant signal, the WTBS conversion is not a substantial reason to increase the PTV's royalty award.

B. PTV's Fee Generation

107. As in prior *cable* royalty distribution proceedings, PTV has placed considerable emphasis on the argument that its award should not be limited by the amounts paid by cable operators to carry PTV distant signals. *See* PTV PFOF at ¶¶304-323, 499-505. PTV's position contrasts with that of the Canadian Claimants, who limit their claim to the amounts actually paid for carriage of Canadian signals. *See id.* at ¶499. PTV's hypothetical argument that it is entitled to more than its fee-generated share of the Basic Fund is contradicted by both the record and by the position PTV itself takes in the context of the *satellite* royalty fund.

1. Lack Of Support For PTV Arguments

108. In its Proposed Findings, PTV once again points to hypothetical examples of why fees-generated may not equal the relative marketplace value of the signals carried. *See id.* at ¶¶318-20. PTV contends that these hypothetical examples "demonstrate" that PTV can be awarded more than its fee-generated share of the Basic Fund. *See id.* However, because those hypothetical examples are just that – hypothetical - they are not evidence that PTV should receive more than the amounts paid for PTV signals. As Mr. Bennett pointed out, PTV has never proven that it is signal A, B or C. *See* Tr. 5481 (Bennett).

109. On the contrary, as discussed in the JSC's Proposed Findings at paragraph 342, the Bortz survey shows that cable operators do not value PTV programming disproportionately more than what they pay to carry PTV distant signals. In fact, the record shows that cable operators place about the same relative value on PTV programming as the amount they pay for those signals – approximately 3.4%.

110. On the legal issue of whether employing a fees-generated methodology is appropriate, PTV fails to acknowledge that the CRT and CARP actually used fees-generated on multiple occasions. PTV quotes the CRT's 1983 Determination in which the CRT stated that "we have rejected fee generation formulas as a mechanical means toward making our allocations." PTV PFOF ¶305 (quoting 51 Fed. Reg. at 12808). However, in presenting that quote, PTV fails to include the upshot of the CRT's determination – that it *would* employ a fees-generated methodology to exclude PTV from receiving royalties from the 3.75% Fund. *See* 1983 CRT Determination, 51 Fed. Reg. at 12808. The CRT specifically took note of PTV's fees-generated in reducing PTV's award in the 1989 Proceeding. *See* 1989 CRT Determination, 57 Fed. Reg. at 15303.

The CARP in the 1990-92 Proceeding applied a fees-generated approach in awarding royalties to the Canadian Claimants. *See* 1990-92 CARP Report at 140-41. This pattern of the use of fees-generated is far from the "consistent rejection" PTV describes in its Proposed Findings. *See* PTV PFOF at ¶305.

111. Moreover, in the context of the satellite royalty fund, the CRT employed a fees-generated approach to exclude claimants from receiving royalties generated by carriage of signals that did not include their programming. The CRT concluded that the owners of programming on network signals were not entitled to receive royalties paid by satellite carriers to retransmit superstations and public television stations. *See In the Matter of 1989-1991 Satellite Carrier Royalty Distribution Proceeding*, CRT Docket No. 91-1-89SCD (Dec. 4, 1992) ("Satellite Carrier Decision"). In that decision, the CRT held that it was inappropriate for the owners of programming on network stations to "seek a share of royalties: (i) they did not earn; (ii) based on programs they did not furnish; [and] (3) paid for stations that did not carry their programming." *See id.* at 24. The CRT noted that:

> Not only would the Networks receive royalties for which they were not eligible and to which they were not entitled, but, because it is a zero-sum game within each category, the other program owners would be deprived of royalties to which they were entitled.

Id. at 24. Accordingly, the CRT excluded all parties other than those who had programming on superstations from receiving royalties generated by the payment of

royalties for those superstations. *See id.* at 25. This decision effectively created a fees-generated structure for the satellite royalty fund.[17]

2. PTV Support Of Fee Generation

112. Although PTV severely criticizes the use of the fees-generated methodology in this proceeding, PTV itself has shown a willingness to support the fee-generation methodology when that methodology suits its own purposes.

113. In the context of the distribution of the 2000 satellite carrier royalties, PTV filed a motion demanding that the Copyright Office immediately distribute all royalties attributable to carriage of the PBS national feed established by the satellite compulsory license of Section 119. *See* PTV Motion (Attached hereto as Appendix A). In that motion, PTV argued that because "PBS is the *only* statutory claimant to [the royalties paid for carriage of the PTV national feed] and that, as a matter of law, the Copyright Office has no authority to distribute the National Feed royalties to anyone other than PBS." *See id.* at 5. PTV specifically endorsed the CRT's use of the fees-generated, quoting favorably the CRT's statement in the Satellite Carrier Decision that parties should not share in royalties paid for stations that did not carry their programming. *Id.* at 7. When the JSC and Program Suppliers objected to PTV's motion

[17] The CRT tried to distinguish the use of fees-generated in the cable context, stating that the DSE formula in the cable content made it difficult to calculate the specific value of the royalty fees paid precisely. *See* Satellite Carrier Decision at 21. The CRT further held that the question was not of value but of "eligibility" to receive royalties from the carriage of stations on which copyright owners had no programming. *See id.* at 23-25. However, the dissenting Commissioner contended that the majority's efforts created a distinction without a difference, stating that "it is consistent with the general rule that the Tribunal has adopted today to argue that programmers whose programs are carried only on noncommercial education stations are confined to a "Noncommercial Educational Fund." *See id.* at Dissenting Op., p. 11-12.

as being premised upon a misreading of Section 119,[18] PTV replied by contending that "it is PBS, the public television copyright claimants and the PBS member stations – not [Program Suppliers and the JSC] – that earned the royalties and furnished the programs that were retransmitted by the satellite carriers making the payments." *See* PTV Reply at 2-3 (Appendix C).

114. While PTV attempted to distinguish the application of the same fees-generated methodology to the cable royalty fund in a footnote, *see* PTV Motion at 7, n.4, there is no difference between PTV's support of fees-generation in the satellite and its rejection of fees-generation in the cable context. PTV's hypothetical examples of signals A, B, and C in the cable context apply equally to the satellite context; the amounts paid for non-PTV satellite signals could be inserted in place of the hypothetical examples PTV uses. Accordingly, PTV's satellite motion directly contradicts the argument it takes here – that a party may receive more or less than the amount that is paid in for carriage of the signals upon which its programming is broadcast.

115. It is clear from PTV's support of fees-generated in the satellite context that the *amount* of fee generation rather than the *principle* of fee generation is the primary motivator of PTV's arguments. Carriage of the PBS national feed accounted for more than 9% of the royalties paid by satellite carriers in 2000. *See* PTV Motion at 6; Appendix D.[19] However, before the creation of the PBS national feed in the Satellite

[18] A copy of the Program Suppliers' and JSC's joint opposition is attached as Appendix B.

[19] Appendix D is a Report of Receipts issued by the Copyright Office on November 27, 2002. Because the Report of Receipts is a public report issued by the Copyright Office, the Panel make take judicial notice of the facts therein. Program Suppliers supplied only a portion of this Report of Receipts in their Exhibit 5.

Home Viewer Improvement Act of 1999, PTV never asked for its fees-generated share of satellite royalties, despite the fact that those royalties were easily identifiable. PTV would have been perfectly able to make the same motion in 1993, 1995 or 1997, but only made the motion when its share of the royalties reached more than 9% of the fund.

C. Subscriber Instances

116. PTV takes inconsistent positions with regard to subscriber instances: it states that "time-related considerations have been given little or no weight since the 1978 proceeding in which they were identified," PTV PFOF at ¶459, yet it contends that "[s]ubscriber instances of carriage are a valuable metric for determining PTV's share based on observations for 1998-99," *id.* at ¶489. Since the 1979 Proceeding, instances of carriage measures have been considered to be time based measures that are entitled to little or no weight. *See* 1979 CRT Determination, 47 Fed. Reg. at 9893 ("Our record suggests that when full-time distant signals are considered, public television signals account for over 10% of the aggregate instances of all distant signal carriage. As with other claims, we have given limited weight to total number of program hours."). As discussed in paragraphs 210-11 of JSC's Proposed Findings, instances of carriage (whether weighted by the number of subscribers or not) are simply a measure of programming time or volume entitled to little or no weight.

117. Despite the fact that subscriber instances are nothing more than a time measure, PTV focuses on that metric when describing the quantitative bases for its requested 12% award. *See* PTV PFOF at ¶¶561-68. PTV refers to these instances as "votes" for PTV programming and "important insights into the judgments of cable operators about the value of PTV distant signals." *Id.* at ¶¶564, 566. It states that "[s]ubscriber instances provide a more reliable measure of the underlying value of distant

signals to cable operators and thus serve as more reliable inputs in determining royalty awards." *Id.* at ¶565. PTV goes even so far as to suggest that subscriber instances are "much more than mere time or volume measures." *Id.* at n.41.

118. However, the use of the relative number of subscriber instances as a value metric is subject to the same attack that PTV uses against the fee-generation methodology. The relative number of subscriber instances for a type of signal does not relate to the relative marketplace value of the programming on the stations brought to those subscribers. The following PTV look-alike "A, B and C" hypothetical example illustrates that point:

PTV Fees-Generated Hypothetical
Applied To Subscriber Instances Measure

Signal	Number Of Subscriber Instances	Marketplace Value To Cable Operators	% Of Marketplace Value
A	15	75	4.7%
B	40	800	50.0%
C	35	725	45.3%

In this hypothetical example, signal A accounts for 15% of the subscriber instances, but accounts for only 4.7% of the marketplace value. Accordingly, signal A would be entitled to only 4.7% of the royalties paid for carriage of signals A, B and C – without regard to any consideration of the amounts paid for those signals. *Cf.* PTV PFOF ¶318; Tr. 1198-203 (Hazlett).

D. Increase In Cable Network Competition

119. In its Proposed Findings, PTV takes a novel position – that while the increased entry and license fees of PBS "look-alike" networks *demonstrate* the value of PTV distant signal programming, *see* PTV PFOF ¶¶453-55, the increased entry of other kinds of cable networks *decreased* the value of other distant signal programming

categories, *see id.* at ¶¶618-20 (proliferation of channels carrying Program Suppliers-type programming). PTV cannot have it both ways, however – increased competition from cable networks cannot be a benefit to its claim while harming other parties' claims.

120. On the contrary, the evidence shows that PTV's programming did become less popular between 1992 and 1998; as noted above, PTV's own metrics for gauging the appeal of its programming to viewers declined during the period. Furthermore, an internal PTV memo described PTV's loss of market position to these cable networks in the 1998-99 period; In the 1998-99 PBS Communication Plan, a PBS author wrote that:

> One of our greatest competitive challenges is in the world of perception and branding. *No other broadcast service has as much competition from cable and satellite.* As a result, member stations are no longer competing on a local station vs. local station basis. Rather, they are competing with nationally branded, highly recognized networks that use national paid media, national editorial and national on-air and cross-channel promotion to build their brands. Further, these networks have the added advantage of promoting channels that are clearly defined by their names (e.g., The History Channel, The Learning Channel, Discovery).
>
> As a result, program genres that were formerly solely "owned" by us in the minds of the public are now also associated with our competition. And viewers *have begun to misidentify where they are watching our programs, at times attributing them to competing services.*

PS Ex. 24-X (emphasis added).

E. PTV's Comparisons To Prior Proceedings

121. PTV engages in a number of comparisons of the quantitative measures of PTV programming between the 1990-92 period and 1998-99, and even includes a chart comparing various measures dating back to 1983. PTV's comparisons, however, are

often inappropriate, or leave out significant information that may have been relevant to a determination of PTV's royalty award.

122. PTV's comparison of the "adjusted" Bortz results between 1992 and 1998 is improper. In comparing the 5.7% "adjusted" Bortz share for PTV in 1992 with a range of adjusted Bortz results of 8.5% to 13.9% in 1998-99, *see* PTV PFOF at ¶608 (Table 22), PTV compares adjustments made using an earlier version of Method 2 with different adjustments made by Dr. Fairley in this proceeding, *see* Tr. 9964-97 (Fairley) (acknowledging use of an altered version of Method 2 in his 1990-92 testimony). Moreover, the figure cited for 1992 was the lowest of the three years in the 1990-92 Proceeding. The 1990 and 1991 adjusted Bortz PTV shares were 6.1% and 6.3%, respectively. In addition, the 1998 figure cited by PTV includes an adjustment for the amount of non-compensable programming on WGN, while the 1990-92 Fairley adjustments contained no such adjustments. Because there was data in the record as to the amount of non-compensable programming on both WGN and WWOR in 1992, *see* 1990-92 Lemieux W.D.T. at 20 (D5:36), Dr. Fairley could have adjusted the PTV shares of the 1990-92 Bortz upwards using the same methodology. As such, PTV compares artificially high shares in 1998-99 with an artificially low share in 1992 – making its comparison misleading.

123. PTV's inclusion of its comparable shares of subscriber instances in 1992 and 1998-99 is also inappropriate. There is no evidence to suggest that PTV's share of subscriber instances was in the record of the 1990-92 Proceeding. The CARP made no reference to that figure, and therefore it is irrelevant to understanding a change in the *relevant* circumstances between 1992 and 1998.

124. Finally, PTV's chart of "Awards and Key Underlying Data for PTV for 1983, 1989, and 1990-92" is misleading because it leaves out substantial information about the PTV awards in 1978, 1979 and 1980 and how PTV's awards related to the "key underlying data" in those proceedings. PTV's chart also makes no mention of the relative amount of PTV programming measured in the early proceedings and again by Dr. Fratrik in this proceeding. In the 1979 Proceeding, the CRT gave PTV an award of 5.25% despite the fact that PTV programming accounted for 13% of distant signal programming time. *See* 1979 CRT Determination, 47 Fed. Reg. at 9885 (13% of programming time), 9893 (5.25% award). Similarly, PTV was awarded 5.25% in the 1978 Proceeding even though PTV accounted for 11-12% of all instances of carriage. *See* 1978 CRT Determination, 45 Fed. Reg. at 63030 (11-12% of carriage), 63040 (5.25% award). Inclusion of these data would show that PTV accounted for similar amounts of programming volume in earlier proceedings, yet was still given an award of approximately 5%.

125. Moreover, there is no evidence that the prior determinations of PTV's award were limited to the quantitative measures selected by PTV. In the 1989 Proceeding, the CRT found that the amount of *fees generated* by the carriage of PTV signals was relevant in its decision to reduce PTV's award to 4.0%. *See* 1989 CRT Determination, 57 Fed. Reg. at 15303.

F. Averaging Quantitative Measures

126. PTV improperly "averages" the various quantitative measures in proposing royalty award "ranges" for the various parties. *See, e.g.*, PTV PFOF at ¶¶608, 613. It states, for example, that a "zone of reasonableness" for PTV's award is established by Nielsen viewing shares, adjusted Bortz shares, and instances of carriage

data. *See id.* at ¶¶ 553-55. By setting ranges based on all the quantitative measures introduced in this proceeding, PTV implicitly contends that all the measures should be weighed equally. Accordingly, PTV's process of generating a range for each royalty claimant based on all of the quantitative measures introduced in this and prior proceedings essentially ignores the disproportionate weight given to the Bortz survey by the CRT and the CARP. As noted in paragraphs 9-37 of JSC's Proposed Findings, the CRT and the CARP gradually increased the weight given to the results of the JSC's constant sum surveys. By the 1990-92 Proceeding, the CARP recognized the Bortz survey as the most direct measure of relative marketplace value. *See* 1990-92 CARP Report at 65.

127. Because of the weight given to the Bortz survey, it is improper for PTV to try to establish a range based on all of the quantitative evidence in the record, and then argue that a midpoint in the range is appropriate. Such an argument, if successful, would mean that parties would simply create quantitative measures of little significance to increase the top of their "range." Instead, the PTV's award should focus on the most significant evidence of relative marketplace value – the Bortz survey of cable operators.

VIII. EVIDENCE CONCERNING CANADIAN CLAIMANTS

128. The Canadian Claimants' Proposed Findings, consistent with their 1990-92 Proposed Findings, embrace the use of a fees-generated methodology to determine the Canadian Claimants' royalty award. As discussed in the JSC's Proposed Findings at paragraphs 376-80, the Canadian Claimants' specific approach to calculating their royalty award is inappropriate; it relies upon a volume measure of the amount of Canadian programming on Canadian stations carried instead of Dr. Ringold's study of the *value* of that programming. The CARP rejected the Canadians' approach in the 1990-92

Proceeding. *See* 1990-92 CARP Report at 140-41. Canadian Claimants provide no new evidence to support the use of a volume measure (either on its own or in combination with Dr. Ringold's value measure) in determining their award.

129. The Canadian Claimants make a persuasive case for the use of a fees-generated methodology. Canadian Claimants recognize that they represent "niche programming" and that actual cable operator purchases of Canadian signals are useful in assessing the value of Canadian programming. *See* Canadian PFOF at ¶76. They note:

> Moving away from royalty data is particularly problematic for small claimant groups because doing so assumes – without evidence – that the value of programming varies dramatically from the royalties paid.

Id. at ¶83. Because "there is no evidence that actually proves that the royalties paid [for signals] are disproportionate to the value" of the signals, the fees-generated methodology is appropriate in valuing claimants such as PTV and Canadians. *See id.*

130. Canadian Claimants further note that "because cable operators make rational decisions about what to carry, it is more likely than not that royalties *are* proportional to the value" of the signals they carry. *Id.* In fact, as discussed in paragraph 341 of the JSC's Proposed Findings, the Bortz survey establishes just that point; that, at least with regard to PTV distant signals, cable operators value those signals in rough proportion to what they pay for them.

131. The application of the fees-generated methodology to the Canadian Claimants' award raises the question of whether the same methodology can be applied to the PTV award. As noted above, there is no logical reason to distinguish the Canadian Claimants from PTV in making royalty awards. Because the ability to identify the amount of fees-generated by Canadian and PTV distant signals is the same, and there is

the same lack of evidence that cable operators value those signals disproportionately to what they pay for them, there is no basis for awarding the Canadian Claimants their fees-generated share of the royalties while not doing the same for PTV.

132. Should the Panel decide to award PTV greater than its fee-generated share of the Basic Fund, the Canadian Claimants share should be reduced proportionately to account for the reduced amount of royalties from which its award is drawn. As a matter of mathematics, if PTV is awarded more than its 3.4% fees-generated share, that overage must come from the royalties paid for the carriage of commercial signals, including Canadian signals.

IX. EVIDENCE CONCERNING MUSIC CLAIMANTS

A. Flaws In The Music Claimants' Duration Study

1. Voluntary Settlement as Benchmark

133. The Music Claimants assert that 4.5% "is a reasonable reflection of the parties' assessment of the value of music in 1991-92. It is also probative evidence of the other parties' perception that there had been no significant decline in music use or other changed circumstances between 1983 and 1991-92." Music PFOF ¶ 32; *see also* ¶¶ 75, 239-47.

134. The Music Claimants assertion is contrary to the express language of the voluntary settlement agreement reached by the parties for the 1991-92 proceeding. "Stipulation of Settlement of Claim of Music Claimants to the 1991 and 1992 Cable Royalty Funds" (the "Stipulation") filed with the Copyright Office in June 1995 by all parties to the proceeding, including the Music Claimants, makes clear that Music's 1991-92 share reflects a compromise agreement among the parties for purposes of settling

litigation, and not any underlying principle regarding the value of music in 1991-92 relative to other copyrighted works. The Stipulation states that:

> The terms set forth in this stipulation represent a compromise and settlement and apply to the 1991 and 1992 Cable Royalty Distribution Proceedings only; *no party shall be deemed to have accepted as precedent any principle underlying, or which may be asserted to underlie, this stipulation.*

Exhibit A to Joint Motion for Declaratory Ruling Concerning the Benchmark for the Music Award ("Joint Motion") (filed January 16, 2003) (emphasis added).

135. The Stipulation makes it clear that at the time the agreement was reached, the principles now being asserted by the Music Claimants were not accepted by any party, including the Music Claimants themselves. As the testimony of Dr. Schink established, the 1991-92 agreement among the parties was nothing more than a settlement and compromise that cannot be used as a benchmark for establishing the Music Claimants' 1998-99 royalty share. Schink W.R.T. at 7-8; Tr. 8494-95 (Schink).

136. The Music Claimants have come forward with no evidence to support their theory that the express language of the Stipulation should be ignored. This contemporaneous expression of the intent of the parties is far more credible than the Music Claimants' belated, self-serving attempt to claim years after the Stipulation was signed that it does not mean what it says.

137. Music's effort to suggest that the parties would not have settled to avoid litigation costs because they were litigating their claims anyway (Music PFOF ¶ 240) is unavailing. The 4.5% award reflected only the parties' decision to avoid the costs and uncertainties of litigation. This makes particularly good sense where music is involved. As the CRT observed, music is "a program element" and quantifying its relative

marketplace value is difficult. 1983 Cable Royalty Distribution, 51 Fed. Reg. 12792, 12812 (1986); *see also* Music Prehearing Memorandum at 3-4 (referring to the difficulties in establishing a royalty share for music that is simply an element of compensable programming); Music PFOF ¶ 29 ("Music is a program element, not a program type. Because music runs throughout all programming, it differs from the other program types in this proceeding.") (emphasis in original). Under these circumstances, the results of litigation are highly uncertain for both Music Claimants and other Phase I parties. A settlement in the face of such uncertainty is not uncommon and offers no relevant guidance as to the underlying issues related to this proceeding. Indeed, the significant time and expense incurred in addressing the unique Music situation are demonstrated by the need for the JSC to retain an expert economist, to respond to the Panel's queries and provide useful evidence as to Music's royalty share. *See* CARP Order of June 4, 2003, App. A, Q. 10 (asking for alternative methods for determining Music's share if prior settlements cannot be used as benchmark).

138. Even if the voluntary settlement reflected the perceptions of other claimant groups about the value of music (which it does not), those perceptions would be irrelevant. The Music Claimants argue that they would negotiate with cable operators in a free marketplace. Music PFOF ¶ 55. Thus, under the Music approach, the relevant issue is how cable operators value music on programming retransmitted via distant signal. The beliefs of other copyright owners are irrelevant. And there is no evidence in the record that the cable operators believe that the value of music is 4.5% of the overall value of the programming on distant signals – or that they would agree to pay a fee equivalent to 4.5% because copyright owners had agreed to settle for that percentage in

order to avoid the costs of litigating with the Music Claimants. In free market negotiations, the cable operators would develop proposed rates by using the approach presented by Dr. Schink. They would look to the share of music licensing fees as compared to the other programming expenses incurred by cable networks and broadcasters. The Music Claimants failed to introduce any evidence of what these other licensees pay for musical works, and thus the only evidence on these license fees in the record was introduced by Dr. Schink or developed during cross-examination of Dr. Boyle. *See* Schink W.R.T. at 17-19.

139. Furthermore, longstanding precedent from the CRT, the CARPs and the rate court indicates that prior agreements of the parties, especially if they are adopted on a nonprecedential basis as this voluntary settlement was, are to be treated with caution and used as a benchmark only if that use is justified based on evidence offered by the party seeking to offer the agreement into evidence. The Copyright Office stated, in ruling on the Joint Motion, that this Panel must consider the precedent established by the CRT of declining to consider settlement agreements offered into evidence in reaching a determination. Order of March 20, 2003 at 24, citing 1979 Cable Royalty Distribution Determination, 47 Fed. Reg. 9879, 9887-88 and 9895 (March 8, 1982); 1991 Satellite Carrier Rate Adjustment Proceeding, Notice of Final Determination, 57 Fed. Reg. 19052, 19058 n. 16 (May 1, 1992). Any suggestion of abandoning this precedent must be based on consideration of "a fully developed written record, including why the Music Claimants think the 1991-92 settlement figures represent an appropriate benchmark for use in the current proceeding." *Id.* The Music Claimants have developed no such written

record. They have failed to present evidence as to why the 1991-92 non-precedential settlement represents an appropriate benchmark for use in this proceeding.

140. The CARPs have reached similar decisions rejecting the consideration of settlements in more recent proceedings. *See, e.g.,* Report of the Copyright Arbitration Royalty Panel in Docket No. 2000-9 CARP DTRA 1 & 2, Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings at 90-91 (declining to adopt Internet streaming rates for noncommercial broadcasters based on settlements reflecting rate proposals that were "made on a nonprejudicial and nonprecedential basis" absent a "rigorous examination" of the circumstances surrounding those agreements) (citations omitted); Final Determination in Docket No. 96-6 CARP NCBRA, Noncommercial Educational Broadcasting Rate Adjustment Proceeding (Adoption of CARP Report by Librarian), 63 Fed. Reg. 49823, 49835 (September 18, 1988) (Register upholds Panel's refusal after examination of the "totality of circumstances" to use voluntary agreements containing "no-precedent clauses" as rate benchmarks).

141. Where Congress has intended that the CRT or a CARP consider voluntary agreements like settlements in contravention to the general rule, it has said so explicitly in the statute. *See, e.g.,* 17 U.S.C. §§ 112(e), 114(f)(2) & 118(b)(3) (permitting CARP to consider voluntary license agreements in establishing rates and terms under other compulsory licenses). No such provision exists in Section 111. And neither the CRT nor any CARP have used settlement awards as benchmarks in cable royalty distribution proceedings. To the contrary, the CRT routinely considered only litigated awards as benchmarks for purposes of determining changed circumstances.

142. For example, in the 1989 cable royalty distribution proceeding, the CRT stated that one of the principal questions before it was: "Have there been any factual changes since 1983 which justify a change in the awards previously made?" 1989 Cable Royalty Distribution, 57 Fed. Reg. 15286, 15288 (1992) (emphasis added). The CRT considered only changes in circumstances between 1989 and 1983 because 1983 was the most recent year over which the parties had litigated. The CRT in the 1989 case was certainly aware of the allocations that the Phase I parties had received for the years 1984 through 1988. *See, e.g.,* 1988 Cable Royalty Distribution, 55 Fed. Reg. 8166, 8167 (1990) (noting that in "joint comments filed by representatives of all the Phase I claimants, the Tribunal was informed that a complete settlement has been reached in Phase I based on the percentage allocations which were adopted by the Tribunal in the 1983 cable royalty distribution proceeding"). Nevertheless, the CRT did not use the 1984-88 allocations as benchmarks in the 1989 proceeding. Those allocations were the product of settlement and afforded no basis for the Tribunal's comparing changed circumstances.

143. The CRT's decision in the 1983 cable royalty distribution proceeding reflects similar precedent. There the CRT addressed the question of whether there had "been any factual changes since 1980, or in the case of the Devotional Claimants and Multimedia, since 1982, which justify a change in the awards previously made?" 1983 Cable Royalty Proceeding, 51 Fed. Reg. 12792, 12792 (1986) (emphasis added). For the Devotionals and Multimedia, the CRT compared the factual circumstances between 1983 and 1982 because their 1982 awards were determined in a litigated proceeding. The 1982 (and 1981) awards of the other Phase I claimants, however, were the product of

settlement. Thus, the CRT looked to 1980, the last year in which it had determined Phase I awards for those parties in a contested proceeding.

144. As the above precedent establishes, the proper approach in determining a claimant's changed circumstances is to compare the circumstances in the year(s) under consideration with the last year in which that claimant received a litigated award. The Music Claimants' proposal – that the CARP look to circumstances in a year where their award was the product of compromise and settlement – is flatly inconsistent with that precedent.

145. The decisions of the CRT and the CARPs declining to use past settlements among the parties as evidence are consistent with the express policy goals articulated by the Copyright Office, which has said that it has a "strong policy in favor of private settlements which it wishes to encourage at every step of the process." Notice of Proposed Rulemaking, *Copyright Arbitration Royalty Panels, Rules and Regulations*, 63 Fed. Reg. 70,080, 70,082 (Dec. 18, 1998). The Music Claimants' position contravenes that policy.

2. Use of Duration Methodology in Music Study

146. The Music Claimants entire study is based on changes in the amount of music minutes per hour between 1991-92 and 1998-99. In other words, it is based on changes in time or duration. As ASCAP and SESAC aptly stated in their proposed findings for the 1978 distribution proceeding, music cannot be valued with a duration analysis.

> Any time-based approach is worthless . . . . [C]opyrighted works are not valued by sellers in any market on the basis of their duration . . . . Music is not usually the sole program element in television, occupying program time to the

> exclusion of all other program elements, and so cannot be valued on a time basis.

ASCAP/SESAC Findings at 2-3, 7.

147. As Dr. Schink demonstrated, even if the Music Claimants were able to show an increasing trend in the use of music,[20] that would not demonstrate an increase in the relevant indicator – the *relative* value of music in distant signal programming as compared to the other program elements that contribute to the value of that programming, which are represented by the remaining claimants. Schink W.R.T. at 9. The issue in this proceeding is how to divide equitably the fixed pool of funds among the claimants. To do this, one must look at the relative contributions of *all the claimants* to the value of the programming carried on the distant signals. Schink W.R.T. at 8-9.

148. The Music Claimants' argue that in 1983 the CRT relied on a quantitative increase in music use to raise the Music share slightly from 4.25% to 4.5%. Music PFOF ¶¶ 66, 208. However, in that year – "the year of the music video" (1983 Proposed Findings of Music Claimants at 7 (JSC Demo Exhibit 22)) – the 180% to 267% change in music use was tied almost completely to the qualitative change that occurred with the new phenomenon of the music video. Most of the additional music use was based on the airing of music videos in music-intensive programming on superstations (especially

[20] As Dr. Schink demonstrated, the Music Claimants failed to make this showing. Schink W.R.T. at 10-13 & App. C; *see also* Tr. 8499-01 (Schink) (when 1989 data are included there is no trend of increasing music use). In their Findings, the Music Claimants concede that the results of the 1989 durational study do not show a consistent trend. The weighted average of minutes in 1989 was higher than the weighted average of Music minutes in 1991-92, but lower than the weighted average of Music minutes in 1998-99. Music PFOF ¶ 136. As Dr. Schink points out, these results can be compared more accurately by using a simple average calculation, which also fails to demonstrate a trend, and shows that the 1989 simple average was higher than either the 1991-92 simple average or the 1998-99 simple average. Schink W.R.T. App. A, Table A-1.

WTBS) and other distant signals. 1983 CRT Determination, 51 Fed. Reg. at 12800-01, 12812; 1983 Proposed Findings of Music Claimants at 32 (major change was the addition of Night Tracks program during the period); *see also* Schink W.R.T. at 13 n.15 and App. D; Tr. 8543-44 (Schink); Tr. 4651-53 (Boyle).

149. The Music Claimants attempt to rely on rate court cases for the proposition that the CARP must look at changes in the amount of music used over time. Music PFOF ¶ 224. They neglect to point out, however, that the fundamental nature of the inquiry conducted by the rate court is very different from this Panel's charge. As noted above, this Panel must determine Music's royalty share from a fixed pool relative to the shares for the other program elements that contribute to the value of programming on distant signals. The rate court, on the other hand, is making the other possible inquiry described by Dr. Schink – an assessment of the *absolute value* of music in television programming (Schink W.R.T. at 3) – without the need to reduce the music share based on the contributions of other program elements.

150. Furthermore, the rate court has determined that music is not responsible for increased television revenues. In *Buffalo Broadcasting*, where the final fees were set to replace the interim fees that the Music Claimants had complained to the CRT about in the 1980 proceeding, the determination that the performing rights organizations should be awarded little more than an inflation adjustment was based on the finding that music is not responsible for the success of television programming, and that programming is not dependent on music for its success. *Buffalo Broadcasting* at *32.

> There can be little doubt that the stations' revenues are not a direct function of the ASCAP music that they utilize in their programming. Music unquestionably makes an aesthetic contribution to those programs in which it is

> included--typically as a mood enhancer in the form of background or bridge music--but for most televised productions, the script, acting and direction are far more significant contributors to the success of the program. (*E.g.*, Tr. 3272-74, 3294-97; AX 312 at 111-13.) If this point required underscoring, it would be provided by the record in this case, which reflects that during the very period when the stations' revenues were rising significantly, the frequency of their use of ASCAP music--measured by needledrops per hour--was declining.

Buffalo Broadcasting at *32.

151. The attempt of the Music Claimants to use an exhibit introduced by JSC for the impeachment of Dr. Boyle as the basis for showing changes in music use credits and feature uses of music between 1983 and 1989, Music PFOF ¶¶ 134-35, 146, is improper and should be rejected. That evidence was introduced solely to demonstrate that the Music Claimants had relied on differentiated music credits in 1989 and could have provided the same type of information again, and had readily available data for 1983 that could have been introduced into the proceeding as well. While Music Claimants' use of the data to make substantive points in its findings demonstrates once again that material from 1983 and 1989 was available to the Music Claimants and could have been introduced as evidence during the proceeding, the substance of the material from 1983 and 1989 was never considered on the record, never tested through cross-examination, and never subject to rebuttal.

3. Evidence of Music in Sports Programming

152. The Music Claimants make no effort to explain the lack of cue sheet matches for Sports programs in the Music Study, except to blame program producers for failing to submit the cue sheets. Music PFOF p. 38 n. 17. The fact that the Music Claimants do not insist on receiving Sports cue sheets and work with the producers on

improving their percentage of cue sheet submissions for Sports programming is in itself a reflection of the fact that music in Sports is not considered significant by the Music Claimants.

B. Flaws In The Music Claimants' Qualitative Evidence

1. Changed Circumstances Analysis

153. The Music Claimants provide a lengthy "changed circumstances" analysis based on qualitative value, but only part of one paragraph refers to Sports programming. *See* Music PFOF ¶ 93 (first half) within ¶¶ 77-93. The focus of the discussion is on the use of music in non-sports programming, with emphasis on movies and syndicated programming.

154. The 4.5% award to the Music Claimants was established almost twenty years ago in the 1983 proceeding. At that time, the royalty share for movies and syndicated programming from the Basic Fund was 67.10%. 1983 CRT Determination at 12818. By the time of the last litigated proceeding for 1991-92, the royalty share for movies and syndicated programming had declined significantly to 52.525%. 1991-92 Librarian's Determination at 55668. As a result of this decline over time in the relative valuation of the program categories that contain the most music, the Music share of the overall royalty funds should also decrease to reflect that change in circumstances.

2. Role of Music in Sports Programming

155. In comparison to lengthy descriptions of music use in other types of programming, the Music Claimants make almost no assertions about the qualitative use of music in Sports programming. See Music PFOF ¶¶ 93-95 and 100-01. Although most of the general references to the use of music at sporting events are found in the section of the Music Findings discussing the feature use of music, they appear to refer mostly to

ambient music heard in the background of the telecast of a Sports event. *See* Music PFOF ¶ 93&101. However, it is questionable whether ambient music is compensable in this proceeding because it falls within the category of "fair use." *See Coleman v. ESPN*, 764 F.Supp. 290, 295 (S.D.N.Y. 1991) (whether use of ambient music in sports broadcasts constitutes fair use raises factual questions). As Frank Krupit testified, most cue sheets do not even include references to ambient music. Tr. 4354-55 (Krupit).

156. One of the few examples of music use in Sports programming cited by the Music Claimants is the Halftime Show at the Super Bowl. Music PFOF ¶ 100. But Music witness Seth Saltzman acknowledged that the Halftime Show consists of much more than musical works, and that in any event many elements of the performances during the live broadcast, including the performance by Gloria Estefan, were not compensable at all or did not involve musical works. Tr. 3980-83 (Saltzman). The Music Claimants collect and distribute royalties only on behalf of the holders of copyrights in musical works, the writers and publishers. They have no legitimate claim to royalties for the use of copyrighted sound recordings or the live performances that occurred during the Halftime Show. *Id.*

3. Music's Radio Claim

157. Music's claim to royalties for commercial FM radio retransmissions is contained in a single paragraph of its Proposed Findings. Music PFOF ¶ 110. In this paragraph, Music incorrectly asserts that its meager evidence on radio carriage demonstrates that *distant* commercial radio carriage continued in 1998 and 1999. In fact, Music's evidence showed no such thing. At most, it showed that some carriage of radio stations by cable systems occurred, and in some cases it did not even demonstrate that.

Music doesn't even attempt to show that distant commercial radio carriage, if it occurs, is of value to cable operators.

158. None of the three specific types of evidence Music cites (Music PFOF ¶ 110) give any indication of distant carriage. During cross-examination, Mr. Krupit admitted that he had not analyzed whether any of the radio stations listed on the Statements of Account he submitted in Music Exhibit 35 were carried on a distant basis, and he did not know which ones were public (noncommercial) radio stations. Tr. 4319-23 (Krupit). Finally, Mr. Krupit acknowledged that it was impossible to tell whether radio stations (commercial or otherwise) were even providing the music listed on the public access channel licensing logs included in Music Exhibit 36. Tr. 4326-27 (Krupit).

159. In short, there is nothing in the record of the proceeding to justify an award of royalties to Music on the basis of distant carriage of commercial radio signals. There is no evidence that such distant carriage takes place, which is a necessary but absent precursor to finding that the carriage has value to cable operators. Although the exact amount of royalties awarded to Music for distant commercial radio carriage back in the 1983 proceeding is not specified in the CRT's decision.

C. Dr. Schink's Assessment Of The Relative Value Of Music

1. Comparison of License Fees and Program Expenses

160. The Music Claimants attack Dr. Schink's comparison of music license fees with other program expenses because that approach has not been adopted by the rate court (Music PFOF ¶¶ 54, 201-02). Dr. Schink's approach, however, was borrowed directly from prior CRT decisions. Schink W.R.T. at 14. *See* 1978 CRT Determination, 45 Fed. Reg. at 63026 (September 23, 1980) (Music Claimants' proposed methodology of comparing music licensing fees with programming costs adopted by CRT but more

programming costs used in calculation); 1979 CRT Determination at 9879 (March 8, 1982) (CRT continues to use methodology to reduce Music award to 4.25%). Music Claimants have offered no record evidence as to why this Panel should not adopt the general approach used by the CRT, and at the same time have failed to provide the Panel with data in their possession that could be used to determine Music's proper share. Furthermore, the inquiry made by the rate court into the absolute value of music on television signals is different from the inquiry made by this Panel into the relative value of music as compared to other program elements. Thus, while rate court cases may provide some useful guidance in certain circumstances, the procedures followed by the CRT, which made the same inquiry as this Panel, are more directly applicable to the question that faces the Panel.[21]

161. JSC agree with the statement of ASCAP and SESAC in the initial CRT proceeding that:

> Music's share of cable television compulsory licensing fees is best determined by examining the existing television market to find the relative amounts paid for by copyrighted music and other copyrighted program materials by those television broadcasters whose signals are carried by cable systems. The different amounts television broadcasters pay for music and for other copyrighted materials is our first guide to the relative value of music.

[21] The Music Claimants claim that the CARP in the Noncommercial Educational Broadcasting Rate Adjustment ("NCBRA") Proceeding rejected the use of program expenses as a basis for determining music license fees. Music PFOF ¶ 202, citing pages 15-16 of the NCBRA Panel Report. It is not entirely clear to what the Music Claimants are referring. Pages 15-16 do not contain discussion of such a prohibition; those pages simply set forth an analysis of the evidence offered by BMI, which included an analysis of programming expenditures and audience size as well as examining revenues and music use. Moreover, there is some discussion of whether to use a method that includes consideration of expenses, but ultimately the CARP Panel determines that changes in program expenditures are reflected in revenues. NCBRA Panel Report at 28. (Page 15 does include a reference in note 22 to Dr. Boyle's use of the same Commerce Department Census Bureau survey relied on by Dr. Schink in his analysis.)

1978 Joint Statement of ASCAP and SESAC at 3.

162. The Music Claimants now object that this methodology was never applied to determine the relative royalty share of any other claimant group. Music PFOF ¶ 209 (citing early CRT decisions). The obvious reason for that can be found in the Music Claimants' own findings: "Music is a program element, not a program type. Because music runs throughout all programming, it differs from the other program types in this proceeding." Music PFOF ¶ 29. The analysis needed to examine an element of programming must necessarily be different than the analysis for comparing programming categories.

163. In the final analysis, this Panel should follow the lead of the early CRT decisions and look at music licensing fees compared to other programming expenses because that methodology, in addition to being based on precedent and supported by some of the Music Claimants before they became unhappy with the results, makes sense. There is no reason that the Music Claimants should receive a larger share of the fees paid for programming rights when that programming is carried on a distant signal basis as opposed to a local basis; nor should the Music Claimants receive a larger share of the fees paid for distant signal programming than for analogous cable network programming. There is no record evidence suggesting that cable operators value the music in distant signal programming compared to all the other elements in that programming differently than broadcasters or cable networks.

164. Instead, Music Claimants try to distinguish this methodology (Music PFOF ¶¶ 205-06) by pointing out that the CRT (at the request of Music Claimants who disavowed the approach that they had earlier favored) stopped comparing music license

fees to other program expenses. 1980 CRT Determination at 9552 (March 7, 1983) (final decision 49 Fed. Reg. 28090 (July 10, 1984). The Music Claimants abandoned this approach when it continued, as it had in the 1979 proceeding, 1979 CRT Determination at 9879 (March 8, 1982), to demonstrate a decline in Music's relative value. 1980 CRT Determination at 9566-67 (ratio of music license fees to program expenses decreased from 1979 to 1980).

165. The Music Claimants acknowledge that "[o]ne of the chief reasons" they gave for abandoning the fee-to-expense comparison approach was that local stations were paying interim fees based on interim music rates set many years before the proceedings. Music PFOF ¶ 207, citing 1980 CRT Determination at 9567. The Music Claimants obviously thought that the ratio of music license fees to program expenses would improve once the rate court reached a decision in the *Buffalo Broadcasting* case. However, as discussed above, that turned out to be an incorrect assumption. Once *Buffalo Broadcasting* resulted in lower music license fees in comparison to other program expenses by limiting music to fee increases for inflation while other program expenses outpaced inflation, *Buffalo Broadcasting at* *44 (increases in music fees tied to inflation adjustments), there was no logical reason for the Music Claimants to go back to a method that would demonstrate that their relative value was declining. But that does not mean that the fundamental logic of the methodology is flawed; it is not, and the approach is still a sensible way to measure the relative value of Music's share.

166. The Music Claimants suggest that somehow the interim fee issue (which certainly did not turn out in their favor the last time they raised it) could affect the result again because ASCAP was paying interim fees in 1998 and 1999. Music PFOF ¶ 207.

First, it has not been shown that the payment of interim fees affects the outcome of the analysis by yielding a lower share for the Music Claimants. Indeed, the outcome of *Buffalo Broadcasting* suggests that such interim rates could result in higher fees. Second, the record demonstrates that, contrary to the assertion of the Music Claimants, the broadcast station fees were not on an interim basis through the first quarter of 1998. Tr. 8541 (Schink); Tr. 4525, 4580 (Boyle). Third, the Census Bureau data, which Dr. Schink found to have high indicia of reliability, Tr. 8638 (Schink), demonstrates that the figures for broadcast station music license fees were similar in 1996, 1997 and 1998. Schink W.R.T. App. F at p. F-16 (showing Census Bureau data on broadcast station fees were comparable). This similarity suggests that the interim status of the music license fees for part of 1998 did not have an effect on the analysis.

2. Role Of Network Data

167. The Music Claimants argue that Dr. Schink's analysis should be rejected because his calculations were based on Census Bureau data that combined the expenses of the Networks and local television stations. Music PFOF ¶¶ 61, 158-61. However, as Dr. Schink explained during his testimony, this objection is based on the mistaken notion that the CRT did not consider any music license fees attributable to network programming. In fact, while the CRT did not use any license fees paid for network programming in its calculations because those fees were paid by the networks, the CRT did use the music license fees that were based on revenues attributable to network programming, i.e., local advertising revenue generated by the network programming broadcast by the network affiliates. *See* Tr. 8760-61 (Schink). As Dr. Schink explained, the concept under the CRT's approach (comparing music license fees to all programming expenses) was correct; however, the CRTs implementation of that approach did not, as

the Music Claimants suggest, exclude all consideration of network programming. The approach that the CRT followed had the effect of inflating the share of programming expenses represented by music license fees. *See* Tr. 8748-53 (Schink).

168. The results of the exercise done by the CRT back in the 1978 and 1979 royalty distribution proceedings would be more problematic today because of the changes in the television broadcast industry brought about by the presence of the new networks like Fox, UPN, WB, and Pax (none of which count as networks in this proceeding). Tr. 8758-61 (Schink). Unlike the traditional three networks, these new networks leave the payment of all music license fees to their affiliates, and pay no music license fees directly. *See* Tr. 8764 (Schink).

169. The Music Claimants advocate the use of data in the "1999 Television Financial Report" published by NAB ("NAB data") instead of the Census Bureau used by Dr. Schink (and previously by Dr. Boyle (Tr. 4583-84 (Boyle); Tr. 8637-38, 8747 (Schink)). Music PFOF ¶¶ 173-74. Dr. Schink stated that he is "very confident" of the reliability of the Census Bureau data, and is not as certain about the reliability of the NAB data, which is submitted on a voluntary basis. The Census Bureau data is reliable both because the survey is very complete, and because businesses are required by law to respond to the survey. Tr. 8638 (Schink).

170. In addition, Dr. Schink explained during his testimony the impossibility of using the NAB data to replicate the method used by the CRT. He described the exercise that would be required to add what the new networks spent on programming to the programming expenditures of the affiliates, who pay all the music license fees, in order to make the NAB data for the new networks comparable to the data for the traditional

networks used by the CRT. The necessary new network programming expenditure data were not included in the NAB data, which in the case of new networks reflects solely the programming expenditures of the affiliates who pay the music license fees, and Dr. Schink was unable to locate it elsewhere. Tr. 8767-68 (Schink).

171. The methodology employed by Dr. Schink, as opposed to that employed by the CRT in the past, also gives a better picture of the marketplace as a whole, in which program distinctions about commercial signals that existed in the early 1980s have largely disappeared. Schink W.R.T. at 14; Tr. 8566-68 (Schink). As content becomes more and more similar, especially with the advent of the "new networks," the use of information on overall broadcast rights and programming expenses is more directly relevant to the programming on cable signals. In the context of looking at relative values, if a program commands high broadcast rights fees, its relative value is likely to be similar for cable distribution. Tr. 8531-32 (Schink). In addition, the programming on distant signals looks a lot like the general entertainment cable network channels. Tr. 8677-79 (Schink).

172. The Music Claimants do not challenge Dr. Schink's description of the increasing similarity of programming across network and non-network broadcast stations. Instead, they object to the inclusion of network data in Dr. Schink's analysis because they claim it decreases the percentage of music license fees compared to broadcast rights or total program expenses. Music PFOF ¶ 169. As discussed above, this theory is derived from figures in the NAB data that do not include the complete information needed to derive accurate percentages.

173. The attempts by Music Claimants to impeach Dr. Schink's testimony with Exhibits 2RX, 3RX and 4RX were unavailing because Dr. Schink demonstrated on cross examination that all of these exhibits were based on incorrect or flawed assumptions. They are largely based on the attempt to take the concept of making an estimation based on 1980 FCC data that Dr. Schink used in a single, very limited manner, after determining that particular figures he used were "reasonable" (Tr. 8593 (Schink)) to derive a figure for 1998 "other programming expenses," and applying that concept wholesale. Tr. 8601-02 (Schink). As Dr. Schink explained, this methodology ignored accurate, published information in favor of continuing to use "relatively nonsensical numbers" even when they were demonstrated to contradict known figures. Tr. 8602 (Schink); *see also* Tr. 8613-15 (Schink) (Numbers in Music Exhibit 2RX applying 1980 ratios to 1998 data have "no sort of safety net" and apply wholesale estimation to the exclusion of information that was published or was included in the record of the proceeding.)

174. For instance, Exhibit 2RX includes a figure for 1998 music license fees excluding networks of $204 million, while record evidence from Music witnesses introduced into the proceeding demonstrates that the correct figure for music license fees paid by stations is $150-160 million. Tr. 8606-09, 8743 (Schink) (introduction of affidavit from ASCAP witness Richard Reimer containing these figures); JSC Exhibit 37-X.[22] Exhibit 2RX also contains a major understatement of the value of broadcast rights fees excluding the three original networks, suggesting that for 1998 this number is $2.1

[22] The data from Music Exhibit 2RX lead to a ratio for non-network stations of music license fees to other programming expenses for 1998 of 4%. Music PFOF ¶ 171. Once

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billion, when syndicator revenues alone were around $4 billion. Tr. 8748-55 (Schink); Music Exhibit 2RX.

175. Music Exhibits 3RX (discussed at Music PFOF ¶¶ 173-77) and 4RX, which attempt to use NAB station expense data in conjunction with the 1980 figures carried forward in Exhibit 2RX, both contain incorrect figures for the programming costs of the new networks like FOX, UPN and WB, because they fail to account for the programming costs incurred by those networks, but just reflect the programming costs of their affiliates. Although the program expenditures shown in the exhibit reflect only non-network programming, the music license fees shown in Exhibits 3RX and 4RX for the new networks include payments for both network and non-network programming. At the same time, the music license fee payments shown for ABC, CBS and NBC reflect revenues from network programming although the program expenditure shown in the exhibits is just for non-network programming. Tr. 8758-68 (Schink); Music Exhibits 3RX and 4RX.

176. Another fundamental problem with the reliance by Music Claimants on music license fee payment figures derived from 1980 data is that those data predate the *Buffalo Broadcasting* decision. The effect of the decision was to reduce the music license fees paid by local stations. Tr. 8769-70 (Schink). Thus, the non-network music license fee payments derived using this method will all tend to be too high.

177. In response to a question from the Panel, Dr. Schink explained that he had done a calculation based on excluding data for the networks and derived a 2.14% ratio for

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an adjustment is made to reflect the correct, lower number for the music license fees paid by non-network stations, this ratio will be below 4%.

music license fees paid by local stations as compared to total programming expenses for 1998. Tr. 8607-08 (Schink). The Music Claimants suggest that Dr. Schink did not provide supporting documentation for this calculation, Music PFOF p. 52 n. 24, but in fact Dr. Schink explained his methodology and sources in detail. He took his calculation of music license fees paid by stations and divided it by a figure for total programming expenses (which was based in part on his "other programming expenses" estimate) from which he had subtracted a 1999 Kagan Data estimate of the total programming expenses of the networks. Tr. 8607-08 (Schink). When asked by the Panel if he could do the same calculation comparing music license fees to broadcast rights, he explained that he had no data that would permit that calculation, but that the number would be somewhat higher because some of the programming costs would be excluded. Tr. 8738-39 (Schink). In response to later questioning from the Panel, Dr. Schink explained that a similar calculation could be done for 1980 based on the data in Appendix E. For 1980, the ratio of music license fees as a percentage of total programming expenses would be about 4.96%. Tr. 8737-8738; Schink W.R.T. App. E.

3. Other Program Expenses

178. The Music Claimants criticize Dr. Schink for making a series of assumptions and including an estimate of other programming expenses in his calculations. Music PFOF ¶ 164-68. What they appear to misunderstand, however, is the relatively minor impact of that estimation of one piece of data on Dr. Schink's overall results. The only item estimated was the "payroll related and other operating expenses" number to be added to the figure for broadcast rights (which was taken from the Census Bureau data unchanged) to arrive at a figure for "total programming expenses." Schink W.R.T. at App. F-1.

179. The estimation was not applied to all of Dr. Schink's results, but was only used to create the lower end of a limited range of the ratio between music license fees and broadcast program expenditures that goes from 1.49% to 2.33%. Schink W.R.T. at 15-17. The number at the upper end of the range, 2.33%, is based solely on published data from the U.S. Census Bureau. Schink W.R.T. at 16, Figure 2. It does not involve any estimate of the "other programming expenses" for payroll and other operating expenses attributable to commercial networks, but uses the most conservative assumption available – that the amount of payroll and other operating expenses attributable to the commercial networks is zero. Tr. 8603-04 (Schink). Thus, this upper boundary is unaffected by any concerns about estimation.

180. However, as Dr. Schink noted several times, it seems reasonable to assume that these other programming costs are not zero. Tr. 8603-04 (Schink). He therefore took the best data available to him, the 1980 FCC Data that contained a detailed breakdown of various categories of programming expenses, and used a ratio derived from that data *solely to estimate the amount of "payroll and other operating expenses"* to add to the broadcast rights figure from the Census Bureau report. Tr. Schink 8591-94.[23] By adding these figures, Dr. Schink arrived at a figure for "total programming expenses" to compare to the Census Bureau figure for music license fees. This ratio indicated that music license fees were 1.49% of total programming expenses. Schink W.R.T. at 17.

4. Cable Network Analysis

[23] Contrary to the Music Claimants assertion that there is "no evidence to support Dr. Schink's assumptions" used in the estimation process, Music PFOF ¶ 168, Dr. Schink describes that evidence in detail in this portion of the transcript and in Appendices E and F to his report. Schink W.R.T. Apps. E & F.

181. Dr. Schink also did an analysis in which he compared music license fees to program expenses of cable networks. He demonstrated that the cable networks' (including music intensive cable networks) 1998-99 music license fee amounted, on average, to 2.07% of the cable networks' 1998-99 total programming expenses, which was consistent with the results he reached with his broadcast expense analysis. Schink W.R.T. at 20 and App. H. The Music Claimants criticize the analysis for using too few actual cable network license agreements instead of estimates. Music PFOF ¶¶ 190, 193.[24] Dr. Schink explained that he erred on the side of being conservative in his categorization of cable networks, as well as the assumptions he used to convert the various fee payment arrangements into percentage of revenue estimates. Tr. 8670-72 (Schink).

182. The Music Claimants also point out that the license fees for some cable networks included in the analysis are based on interim rates. Music PFOF ¶¶ 190, 192. They fail, however, to explain the impact of this point. Interim rates can last for many years as illustrated by the 1989 *Turner Broadcasting* decision that set interim cable network license fees. *See United States v. ASCAP (Application of Turner Broad Sys., Inc.),* Civ. 13-95, slip. op. at 24 (WCC) (S.D.N.Y. Oct. 12, 1989); *see also* Tr. 4430-33 (Boyle); Tr. 8672-73 (Schink). As demonstrated by the *Buffalo Broadcasting* decision, interim rates can also turn out to yield higher license fees than the fees the rate court adopts in its final decision.

[24] The Music Claimants also noted that the CRT had not done a comparable analysis, but Dr. Schink pointed out that there were also very few cable networks at that time. Tr. 8679 (Schink).

183. Dr. Schink agreed that the CRT in its early decisions did not examine the ratio of music license fees to other cable network expenses, but he noted that there were also very few cable networks at that time. Tr. 8679 (Schink).

184. The Music Claimants also point out that Dr. Schink's analysis included a number of cable networks that as start-ups have little or no revenue, but spend a fair amount on programming. Music PFOF ¶ 200. Dr. Schink explained during his testimony that all of these situations involved relatively small numbers and that what drives the numbers is the major cable networks, which are profitable. Tr. 8681, 8688-89 (Schink).

5. Trending Comparison

185. The Music Claimants suggest a number of complications with attempting a "trending comparison" between the ratio of music license fees as a proportion of broadcast rights fees in 1983 and 1998-99. Music PFOF ¶¶ 178-79. JSC believe that there is a fundamental problem with trending from any of the prior CRT decisions about Music's royalty share – the CRT overestimated the Music share because it failed to compare "apples to apples." It accepted the approach presented by ASCAP, which included music license fees based on local advertising revenue derived from network programming in the numerator of its ratio, but failed to include any programming costs for those programs in the denominator. Tr. 8748-53 (Schink). Dr. Schink's approach of looking at the relationship between music license fees and programming costs for all of broadcast television solves this problem. Tr. 1753 (Schink).

186. The Music Claimants' attempt to analyze trends based on the 1980 FCC Data and 1998 NAB data for non-Network stations fails to provide accurate trend information because the non-Network NAB data demonstrate the difficulties identified by Dr. Schink. In particular, the programming costs incurred by new networks like FOX,

UPN and WB that receive compensation in this proceeding would have to be added to the program cost figures in the NAB data. Otherwise the ratio of music license fees to program costs would not be valid because the numerator would include music license fee payments for both network and non-network programming, while the denominator include only non-network program costs. Tr. Schink (8758-60). As Dr. Schink noted, the additional necessary cost information is not available in the NAB data. Tr. 8767-68 (Schink).

X. STATEMENT CONCERNING REVISED BORTZ RESULTS

187. Pursuant to the Panel's August 28 Order, the JSC submit that they are requesting, pursuant to Mr. Trautman's revised calculations of the adjusted Bortz survey results, the following awards:

Year	Basic Fund	3.75% Fund
1998	36.6%	40.3%
1999	38.4%	42.4%

Respectfully Submitted,

Robert Alan Garrett /aw

Robert Alan Garrett
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June 21, 2001

BY HAND DELIVERY

Office of the General Counsel
United States Copyright Office
James Madison Memorial Building
Room 403
First and Independence Avenue, SE
Washington, DC 20540

Re: Distribution of PBS National Satellite Feed Royalty Funds for Calendar Years 2000 and 2001

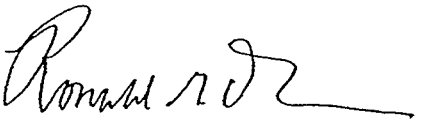
Dear Sir:

Enclosed please find an original, five copies, and an extra copy of the Motion of Public Broadcasting Service for Distribution of PBS National Satellite Feed Royalty Funds for Calendar Years 2000 and 2001.

Please date-stamp the extra copy and return it to our waiting messenger.

Thank you.

Sincerely,



Ronald G. Dove, Jr.

Counsel for Public Broadcasting Service

Before the
COPYRIGHT OFFICE
Library of Congress

In the Matter of	)	
	)	
Distribution of PBS National	)	Docket No.
Satellite Feed Royalty Funds	)	
for Calendar Years 2000 and 2001	)	

MOTION OF PUBLIC BROADCASTING SERVICE FOR DISTRIBUTION OF PBS NATIONAL SATELLITE FEED ROYALTY FUNDS FOR CALENDAR YEARS 2000 AND 2001

The Public Broadcasting Service ("PBS"), as statutory agent for "all public television copyright claimants and all Public Broadcasting Service member stations," *see* 17 U.S.C. § 119(c)(5), hereby moves the Copyright Office to distribute directly and immediately to PBS all PBS national satellite feed royalty funds for CY 2000 (and for CY 2001, as soon as those funds become available). Because Congress has designated PBS the sole Phase I claimant to those funds and the exclusive agent for distribution of the funds to underlying rights holders, the Copyright Office procedures that otherwise would govern the resolution of Phase I claims and distribution of the funds to rights holders do not apply here. The separate statutory treatment of PBS national feed royalties reflects Congress' intent to create a narrow exception to the conventional royalty distribution procedures in relation to this specific pool of royalties in this limited circumstance.

BACKGROUND: THE PBS NATIONAL SATELLITE FEED

On November 29, 1999, President Clinton signed into law the Intellectual Property and Communications Omnibus Reform Act. Title I of that legislation, the "Satellite Home Viewer Improvement Act of 1999," amended Section 119 of the Copyright Act to provide for payment of compulsory license royalties by satellite carriers retransmitting the "Public Broadcasting Service satellite feed." This statutory license is effective for a two-year window, expiring on January 1, 2002 when local-to-local must carry obligations become effective, *i.e.*, when satellite carriers retransmitting local programming in a particular market will be required to retransmit all local programming in that market, including the local PBS station. *See* 17 U.S.C. § 119(a)(1); Conference Rep. No. 106-464, at 99 (1999).

The Public Broadcasting Service satellite feed ("PBS National Feed") is defined in the statute as "the national satellite feed distributed and designated for purposes of this section by the Public Broadcasting Service consisting of educational and informational programming intended for private home viewing, to which the Public Broadcasting Service holds national terrestrial broadcast rights." 17 U.S.C. § 119(d)(12). The statute specifically provides that, with respect to royalty fees paid by satellite carriers for retransmitting the PBS National Feed, "*the Public Broadcasting Service shall be the agent for all public television copyright claimants and all Public Broadcasting Service member stations.*" 17 U.S.C. § 119(c)(5) (emphasis added).

In enacting the PBS National Feed compulsory license, Congress had two principal objectives: (1) to ensure that public television programming is available to satellite dish owners throughout the United States until local-to-local must-carry obligations become effective; and (2) to provide needed revenue to PBS and its member stations. PBS representatives testified to the importance of those goals in Congressional hearings preceding

enactment of the National Feed provisions. *See Hearing on Copyright Licensing Regimes Covering Retransmission of Broadcast Signals Before the House Judiciary Subcommittee on Courts and Intellectual Property,* 105th Cong. 32-39 (1997) (Statement of Tom Howe, Director and General Manager, University of North Carolina Center for Public Television) (copy attached at Tab A); *Hearing on the Copyright Office Report on Compulsory Licensing of Broadcast Signals before the Senate Committee on Judiciary,* 105th Cong. 92-97 (1997) (Statement of Fred Esplin, General Manager, KUED-TV, University of Utah) (copy attached at Tab B).

For example, Tom Howe, Director and General Manager of the University of North Carolina Center for Public Television, testified to the "simple vision" mandated by Congress that "[a]ny American who wishes to receive public television via satellite should be able to do so." *Hearing before the House Judiciary Subcommittee on Courts and Intellectual Property,* at 33. He emphasized that "public television is unique in its noncommercial status and in its public service mission to make educational and cultural programming available to everyone" and that a compulsory license for the national satellite feed "would enable all satellite subscribers to get programming services offered by PBS via their satellite dish." *Id.* Mr. Howe further explained that the compulsory license provisions would "provide much needed revenue to public television." *Id.* at 38-39.[1]

The special compulsory license provisions for the PBS National Feed were intended to provide a simple mechanism for transferring royalties from the satellite carriers to PBS, with PBS acting as the statutory agent for distributing the funds to all public television

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[1] Fred Esplin, General Manager of public television station KUED-TV, University of Utah, made these same points before the Senate Judiciary Committee. *See Hearing before the Senate Judiciary Committee,* at 92-97.

copyright claimants and PBS member stations. *See* 17 U.S.C. § 119(c)(5). Hearing testimony confirms that the provisions were intended to "effectively create[] a compulsory license within the Section 119 compulsory license. DBS providers would license the PBS national feed *from PBS* [under the compulsory license], and *PBS in turn would be responsible for the compensation of all underlying rights holders.*" *Hearing before the House Judiciary Subcommittee on Courts and Intellectual Property,* at 36 n.1 (emphasis added). The special licensing provisions were expressly endorsed by the Copyright Office. *See id.* at 33.

The PBS National Feed provisions thus created a narrow exception to the Copyright Office's conventional royalty distribution procedures. By mandating that all PBS National Feed royalties be distributed to PBS as the sole designated statutory agent, and by charging PBS with the duty to compensate "all underlying rights holders," *i.e.,* "all [Phase II] public television copyright claimants" and "all [Phase II] Public Broadcasting Service member stations" (*see* 17 U.S.C. § 119(c)(5)), the statute effectively designated PBS the *only* legitimate Phase I claimant to PBS National Feed royalties. Accordingly, those royalties should be distributed to PBS forthwith.

ARGUMENT

I. THE COPYRIGHT OFFICE SHOULD IMMEDIATELY DISTRIBUTE TO PBS ALL PBS NATIONAL SATELLITE FEED ROYALTIES.

Section 119 of the Copyright Act sets out the standard procedures for the Copyright Office to follow in determining whether a controversy exists concerning the distribution of satellite royalties, and in distributing royalties to the appropriate claimant(s) to the extent there is no such controversy. *See* 17 U.S.C. § 119(b)(4). Those procedures are necessary whenever a number of different parties lay claim to the same royalty pool. Where Congress has

designated a single party as the sole claimant to a specific royalty pool, however, the rationale for applying those procedures dissolves. That is precisely the situation here.

In enacting the PBS National Feed provisions, Congress established a limited exception to the general royalty distribution procedures. By definition, PBS is the statutory "agent" for "*all* public television copyright claimants and *all* Public Broadcasting Service member stations" in connection with the PBS National Feed royalties. 17 U.S.C. § 119(c)(5) (emphases added). We would submit that PBS is the *only* statutory claimant to those royalties and that, as a matter of law, the Copyright Office has no authority to distribute the National Feed royalties to anyone other than PBS.[2]

Nowhere else in Section 119 is an entity designated as an "agent" for the receipt of all funds from a particular royalty pool on behalf of all underlying rights holders. To give effect to this unique provision, the Copyright Office in this limited circumstance should treat PBS differently than it does other claimants. To do otherwise would render the statutory "agent" designation a nullity. Accordingly, the Copyright Office should act to effectuate the intent of Congress by making a direct, immediate, and full distribution to PBS of the CY 2000 National Feed royalties (and the CY 2001 royalties as soon as possible after they are deposited, *i.e.*, on a semi-annual basis (*see* 17 U.S.C. § 119(b)(1)).

According to Statement of Account forms filed with the Licensing Division of the Copyright Office, there were 18,384,604 total subscribers to the PBS National Feed during the first accounting period of 2000, and 24,160,491 total subscribers to the PBS National Feed

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[2] Arguably, PBS's statutory designation as "agent" for underlying rights holders also should relieve the Copyright Office of any obligation it otherwise might have (*see, e.g.*, 17 U.S.C. § 119(b)(4)(C)) to hold back some percentage of the royalties for payment of Phase II (continued...)

Marybeth. We appreciate your having come here with your 2 experts, accompanying the expert. Good to have you all with us and I presume you are invited to hang around, Marybeth, if you want to do so, and we again thank you all for being here.

As the Register leaves, I will introduce the second panel as you make your way to the table. Our first witness for this panel is Charles "Chuck" Hewitt. Mr. Hewitt is the president of the Satellite Broadcasting and Communications Association of America, a national trade association representing all segments of the satellite broadcasting industry.

Our second witness is Mr. William "Rik" Hawkins, president and founder of Starpath of Hardin County, a small retail satellite company in rural Kentucky.

Third, we have Steven J. Cox. Mr. Cox is senior vice president of New Ventures for DIRECTV, Incorporated, a unit of Hughes Electronics Corporation. Mr. Cox oversees the company's regulatory and legislative affairs and is responsible for the company's signal integrity unit.

Fourth, we have Mr. James Goodmon, who is the president and chief executive officer of Capitol Broadcasting Company. Capitol owns several radio and TV stations in the Raleigh and Charlotte, North Carolina areas. Capitol Broadcasting Company also owns the Durham Bulls Baseball Club and Microspace Communications Corporation.

Our final witness on this panel is Mr. Tom Howe. Mr. Howe is director and general manager of the University of North Carolina Center for Public Television and is here on behalf of the Public Broadcasting Service, of which he serves on their board of directors. Mr. Howe has created projects such as rebuilding 3 of the university's TV transmission facilities, and a new transmission facility is currently under construction to serve the southeastern area of our State.

I will try not to extend preferential treatment to our 2 North Carolinians, gentlemen. It is good to have all of you here.

I again want to admonish you on the red light. I hate to have to do this, but I think you all agree that with this many people here and with the active floor activity ongoing as it does, I think we have to adhere as close to the 5-minute rule as we can. I assure you all that your written testimony will be carefully, thoroughly, and deliberately examined.

Mr. Howe, for want of a better way of doing it, why don't we start from my left and we'll move to my right.

STATEMENT OF TOM HOWE, DIRECTOR AND GENERAL MANAGER, UNIVERSITY OF NORTH CAROLINA CENTER FOR PUBLIC TELEVISION, ON BEHALF OF THE PUBLIC BROADCASTING SERVICE

Mr. HOWE. Thank you Congressman. Good morning. I am Tom Howe, director and general manager of the University of North Carolina Center for Public Television. I am also a member of the board of directors of the Public Broadcasting Service. I am here to ask you, on behalf of PBS and on behalf of your constituents, to amend the Copyright Act to permit distribution of PBS programs

by satellites to homes whether or not they receive broadcast service.

PBS stations support the PBS proposal and favor immediate action. Just last week the PBS proposal was put to a formal vote at the PBS annual membership meeting in Washington, D.C. The official tally showed that 114 of 121 station representatives present, 94 percent, voted in support of PBS' effort in this area.

PBS is a nonprofit membership corporation whose 173 members are licensed to operate the Nation's public television stations. Additionally, PBS represents public television in compulsory license rate-setting and royalty distribution proceedings before the Library of Congress. However, and most importantly, public television is unique in its noncommercial status and in its public service mission to make educational and cultural programming available to everyone.

The medium through which we fulfill that mission has changed dramatically. For the past 40 years most viewers received television in 2 ways, either by broadcast TV via an antenna or through cable. In North Carolina, for example, we operate 11 TV transmitters and 23 translators, and the UNC TV signal is carried by over 260 cable systems.

Of late, the direct broadcast satellite industry has dramatically changed. At first the dishes were large and unwieldy, suitable only for the most remote locations. Now satellite dishes are compact, offering a wide range of programming. These dishes have been gaining in popularity. But there is an irony at work here. While satellite viewers can get over 150 channels on their satellite system, if they live in an area where they can receive broadcast systems, then they are blocked from receiving PBS national service on their satellite system.

I am in front of you today to emphasize the importance of a very simple vision. Any American who wishes to receive public television via satellite should be able to do so.

My fellow PBS managers and I support PBS' proposal to amend the Copyright Act in order to provide a nationwide compulsory license to permit use of PBS' national satellite services by DBS providers. This would enable all satellite subscribers to get programming services offered by PBS via their satellite dish. It would also enable PBS to use the 4 to 7 percent of DBS channels set aside for educational purposes to provide several channels of service to viewers.

In view of the unique nature and mission of public broadcasting, passage of this proposal would not constitute a precedent for similar treatment of commercial programming.

In August the Copyright Office endorsed PBS' proposal to make a national feed available to all satellite users, even those users who are in areas covered by broadcast TV. I cannot reinforce the importance of this proposal enough because of the impact it will have on the public we serve. A satellite dish owner who cannot get PBS services because of legal restrictions gets very angry with public broadcasters, with the satellite service provider and ultimately with Congress.

Congress has consistently passed laws to ensure public television services are universally available to the American public. It is time

to do so again. An amendment to the Copyright Act this year to ensure these set-aside channels are put to good use is consistent with that longstanding policy.

In proposing to expand the existing satellite compulsory license to permit nationwide retransmission by DBS providers, PBS could offer satellite feeds nationwide while insuring appropriate compensation for rights holders. Those served and unserved households under the Copyright Act could obtain the PBS services without the need for PBS to engage in costly and difficult renegotiations of existing program agreements.

Congress should extend this compulsory license to permit the retransmission of new PBS programming services by DBS, services such as "ready to learn" services for preschool children, telecourses for adults and other services. There is a wealth of material that PBS and public television can provide to viewers, to all its viewers.

DBS is a technology that could have an enormous impact in helping the nation reach its educational goals by ensuring that viewers, teachers and students, have convenient and affordable access to new and improved learning opportunities in educational programming. I am here to ask you to create the synergy between PBS and DBS so we can recognize their full potential.

Let me leave you with this thought. The average American household watches 7 hours of television every day. Most children spend 25 hours a week in the classroom and 20 hours a week in front of a television set. I know that we all want some of that time to enrich, educate and enlighten those who watch television, regardless of how they choose to receive their service. Your support of this proposal will help make that happen.

[The prepared statement of Mr. Howe follows:]

PREPARED STATEMENT OF TOM HOWE, DIRECTOR AND GENERAL MANAGER, UNIVERSITY OF NORTH CAROLINA CENTER FOR PUBLIC TELEVISION, ON BEHALF OF THE PUBLIC BROADCASTING SERVICE

I. INTRODUCTION

Good morning. I am Tom Howe, Director and General Manager, University of North Carolina Center for Public Television and member of the Board of Directors of the Public Broadcasting Service. I appreciate the opportunity to participate at this hearing and to express my views on the critical issues that are currently before the Congress. I will provide a brief overview of public broadcasting, and then highlight PBS's proposals for compulsory licenses relating to direct broadcast satellite (DBS) technology.

II. OVERVIEW OF PUBLIC BROADCASTING

PBS is a nonprofit membership corporation whose 173 members are licensed to operate virtually all of the nation's public television stations. PBS also represents all public broadcasting claimants in compulsory license rate-setting and royalty distribution proceedings before the Library of Congress.

Public broadcasting was created with two missions in mind—one focused on programming services, the other focused on using technology to advance education. More than 40 years ago the nation's policy makers realized that television was the most powerful communications medium yet devised. Building on the tradition of a nationwide system of land grants dedicated to public education, which led to land grant colleges and universities, a third of the country's broadcast spectrum was reserved for noncommercial educational purposes in the 1950's. Public broadcasters were entrusted with the responsibility of adapting this then-new and potent technology—television—to educational purposes. Their mandate was to serve communities across the country by providing informational, educational and cultural programming not available on commercial media.

Public broadcasting is unique in its noncommercial status and its corporate and public service mission to make educational and cultural programs available to a wide audience. Congress has repeatedly found this programming important because the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs.

Today, PBS and its member stations distribute a rich variety of educational programming to the public and to educational institutions using several distribution means. The core service is PBS's National Program Service, which is distributed by satellite for broadcast by PBS member stations, as well as directly by DBS services to areas unserved by local broadcast stations. A related broadcast offering is PBS's Ready to Learn Service, an educational service offered in day care centers across the country that helps prepare preschoolers to enter kindergarten "ready to learn."

But public broadcasting is more than a broadcast service. The nation's number one source of classroom programming, PBS reaches 30 million students in kindergarten through 12th grade and 2 million teachers in 70,000 schools, offering a diverse mix of programming designed with specific learning objectives in mind. PBS is the world's leader in college telecourses; over 2.6 million adults have earned college credit through the PBS Adult Learning Service. PBS's popular distance learning courses are offered by broadcast, cable, satellite and video-cassette and disc, and through the PBS ONLINE® Website. PBS is now developing a number of professional development services for teachers using a mix of distribution media. PBS ONLINE, PBS's award-winning Internet service, is widely recognized for its superlative educational depth and ease of use.

A technical leader, PBS was the first to develop closed captioning for the hearing impaired, descriptive video services for the visually impaired, stereo television services, and to transmit television programming by satellite. PBS is now at the forefront of the development of advanced digital television.

III. PUBLIC POLICY RELATING TO PBS

Over the years, Congress, various Administrations, the Copyright Office and the Federal Communications Commission have recognized the unique mission of public broadcasting by enacting many existing laws and regulations, including preferences, exemptions and compulsory licenses still in place today. These include:

- Compulsory copyright licenses to use published nondramatic musical and pictorial, graphic and sculptural works, and exemptions for various educational uses, such as transmission of sound recordings and copies embodying performance of nondramatic literary works (17 USC 118(d), 114(b) and 112(d)).
- Must-carry requirements for cable services to carry public television signals.
- The Cable Act requirement that DBS providers set aside 4–7% of channels for noncommercial educational and informational programming.
- A requirement that PBS maintain an unencrypted feed of its National Program Service so that it can be received by satellite home dish owners (without regard to any "served" versus "unserved" household distinction. *See* 47 U.S.C. 605(c)).
- Continued reservation of noncommercial educational spectrum for DTV.
- Continued congressional funding of public broadcasting.

IV. PBS'S SATELLITE COMPULSORY LICENSE PROPOSAL

A. Background on Rights Clearances

Even those with a passing familiarity with the entertainment industry will understand why it is so difficult for PBS and its producers to clear the rights necessary to extend PBS's services to the public through new media and means of distribution. Every program includes a variety of separate elements, usually owned by differing interests. For example, there are rights in the script, in the music, in visual arts included in the program, in stock footage, in music composition and in music recordings. PBS is continuing the difficult process of clearing all of the rights to each of its programs for DBS use, but PBS believes that a carefully-crafted compulsory license is the best way to assure that public television programming is distributed, under the FCC's set-aside rules, to all DBS subscribers. PBS estimates that it will take an additional two to three years to clear all the rights to its National Program Service without such a mechanism.

PBS and its member stations understand why commercial entities prefer to negotiate licenses in the commercial marketplace it provides perhaps the most efficient means of establishing the value of a property and is apt to produce the greatest financial return. Public broadcasters, however, by definition, do not operate in that marketplace. They are nonprofit, educational institutions with a public service mis-

sion. Compulsory licenses are best suited to address just this kind of situation while assuring appropriate compensation to rights holders.

B. Existing Cable and Satellite Retransmission Licenses

In PBS's view, the existing cable and satellite compulsory license schemes should be retained; they are efficient, and facilitate both the distribution of programming and the full development of these technologies. In the absence of a compulsory license, each retransmission by cable and satellite of PBS programs would require expensive, time-consuming, multi-party negotiations, undoubtedly eliminating some programming because the cost of clearing the rights would be too high.

The compulsory licenses are particularly important to PBS in view of Congress's goal of universal access to public broadcasting services, which these compulsory licenses facilitate.

C. Congress Should Expand or Create a Compulsory License to Apply to PBS's National Program Satellite Service

As further described in Attachment A, "Proposal of PBS to Amend the Copyright Act to Permit Further Distribution of PBS Programs by Satellite," PBS proposes to expand the existing satellite compulsory license to permit nationwide retransmission by DBS providers of PBS's National Program Service.

This proposal would permit PBS to offer a DBS provider a PBS satellite feed that could be retransmitted nationwide, while ensuring appropriate compensation for rights holders. As a result, both served and unserved households could obtain the PBS service from their DBS provider without the need for PBS to engage in costly and difficult renegotiations of existing program agreements.

One method to accomplish this would be to amend current Section 118, which already provides a compulsory license for the use of certain works by public broadcasters. Alternatively, Congress could amend Section 119 to cover these services.[1]

In its Report to the Senate Judiciary Committee dated August 1, 1997, the U.S. Copyright Office recommended that the PBS national satellite service be exempt from the "unserved household" restrictions of Section 119 as one means of accomplishing this same goal. PBS participated fully in the Copyright Office proceedings that led to this Report. PBS's proposals to the Copyright Office attracted virtually no comment from other interested parties and appear non-controversial.

Revision of the satellite compulsory license will help ensure that DBS providers can comply with their set-aside obligation under the Communications Act for noncommercial educational and informational programming and provide access to PBS's services to DBS viewers. In view of the unique nature and mission of public broadcasting, passage of the proposal would not constitute a precedent for similar treatment of commercial programming.

D. Expand Compulsory Licensing to Other PBS DBS Services

To further facilitate the FCC set-aside obligations of DBS providers, Congress should also extend the compulsory license regime to permit DBS providers to retransmit new PBS DBS programming services (e.g., Ready to Learn service for preschool children, instructional programs intended for teachers and students at school and home), as well as programming from other public broadcasting sources.

Improving education is a top priority of national and state policy makers, parents and businesses. DBS is a technology that could have an enormous impact in helping the nation reach its educational goals by ensuring that teachers and students have convenient and affordable access to new and improved learning opportunities. Public broadcasting has tremendous expertise in distance learning and extensive curriculum resources that could be made more accessible to millions of learners through DBS.

Access to these pioneering services could be extended significantly through DBS. Establishing a compulsory license to permit retransmission of this and similar programming is particularly important because it would help fulfill PBS's mission to make educational content available to a wide audience while also ensuring that DBS providers can comply with their new set-aside obligations.

[1] We believe the best statutory mechanism is for PBS (or any other "public telecommunications entity" (as defiend in 47 U.S.C. 397) that holds all underling national terrestrial broadcast rights) to be the beneficiary of a separate public broadcasting satellite compulsory license, and to control its use. As a technical matter, PBS proposes a provision, worded quite like present Section 118, that effectively creates a compulsory license within the Section 119 compulsory license. DBS providers would license the PBS national feed from PBS, and PBS in turn would be responsible for the compensation of all underlying rights holders.

E. Station Support

The Copyright Office's recommendation concerning the PBS proposal relied upon an assumption that PBS members would support such a change. Since that time, PBS has taken several steps to confirm that support. First, PBS sponsored a detailed survey of all 178 public television licensees. The survey revealed that approximately two-thirds of the membership supported the immediate expansion of compulsory licensing to national PBS DBS services (about 10% of the membership was undecided and a minority was opposed). Then, just last week, the PBS proposal was put to a formal vote at the PBS annual membership meeting in Washington, D.C. The official tally showed 114 of 121 station representatives voted in support of PBS's efforts in this area. Thus, 94% of stations now support the PBS proposal and favor immediate action.

V. CONCLUSION

PBS recognizes that the interests of rights holders must be protected in order to encourage the continued creation of programming for television. It is likewise important to ensure that the public has the benefit of noncommercial applications of new technologies, particularly for educational purposes. A limited expansion of compulsory licenses directed specifically at enabling widespread distribution of public broadcasting programming through DBS technologies, and subject to compensation for such distribution, reflects an appropriate balance of the interests of rights holders and the public interest.

Thank you for your time. I would be happy to answer any questions you may have.

PROPOSAL OF THE PUBLIC BROADCASTING SERVICE TO AMEND THE COPYRIGHT ACT TO PERMIT FURTHER DISTRIBUTION OF PBS PROGRAMS BY SATELLITE

The Public Broadcasting Service ("PBS") is seeking an amendment to the Copyright Act that is of major importance to public television and its viewers. The proposed change would permit public television to offer additional direct broadcast satellite ("DBS") services on a national basis, thereby preserving public television's universal reach, earning new revenues for its member stations, and preserving local and national services. As discussed below, it is essential that the amendment be enacted this year in order for public television to be in a position to offer programming to satisfy the congressionally mandated DBS set-aside.

I. BACKGROUND

A. *PBS Initiative to Provide a DBS Service.* The Satellite Home Viewer Act of 1988 requires PBS to maintain an unencrypted "feed" of its National Program Service ("NPS") to satellite home dish owners. 47 U.S.C. § 605(c). For many years, PBS maintained this free service on a single C-band satellite transponder, but in 1995, partly in response to the uncertainty over continued federal funding, PBS began to explore the possibility of offering it to the new generation of DBS operators. PBS first reached agreement with DIRECTV, the industry leader, to provide such a service and has since reached similar agreements with other DBS providers. Each of these agreements authorizes DBS providers to offer the PBS national feed to "unserved households" only (as defined in the Satellite Home Viewer Act, 17 U.S.C. § 119). The service has proved very popular with satellite viewers.

B. *The DBS Noncommercial Reservation.* In 1992, at the request of public television, Congress reserved 4–7% of DBS channel capacity exclusively for noncommercial educational and informational programming. In 1996—after four years of litigation—the Court of Appeals upheld this noncommercial reservation on DBS. In April, 1997, public television filed comments at the FCC to assure maximum access to the reserved DBS capacity. The FCC is expected to issue rules to implement the set-aside later this year.

II. THE PBS/DBS PROPOSAL

At the end of the last legislative session, PBS sought an amendment to Section 119 of the Copyright Act to provide a nationwide compulsory license to permit the use of PBS's national satellite service by DBS providers. Although raised too late in the session for consideration, the amendment gained broad support.

PBS subsequently filed extensive comments at the Copyright Office proceeding instituted by Senator Hatch reiterating the 1996 proposal and advocating further that a compulsory license be created to cover new satellite "feeds," including distance learning programs, that could be used to "program" the DBS set-aside channels. The

DBS medium, through the set-aside, offers exciting new opportunities to distribute instructional and educational materials, programming that has for the most part been previously unavailable to the general public. Although PBS continues to "clear" DBS rights to individual programs, a compulsory license is the most efficient way to provide a full complement of services to the public.

The Copyright Office, in its report dated August 1, 1997, acknowledged PBS's 1996 legislative proposal by recommending that the PBS national satellite service be exempt from the "unserved household" restrictions of Section 119. PBS's proposals before the Copyright Office attracted virtually no comment from other interested parties and appear non-controversial.

III. REASONS FOR THE PROPOSAL

PBS wishes to provide public television programming services that could be redistributed by DBS providers to all households in the United States. Such services would be structured in a way that would benefit both local stations and public television's producers (many of which are also member stations). The amendment would thus implement a simple vision that any American who wishes to receive television signals via satellite should be guaranteed ready access to the best programming public television has to offer.

Other major reasons for this proposal are as follows:

A. *FCC Action.* PBS must act promptly to provide the educational satellite program services contemplated by the set-aside provision of the Communications Act; the set-aside is of limited practical value without the ability to clear all the necessary program rights. Without further action, an important opportunity for public television could be lost.

B. *Universal Access.* Universal access to public television, regardless of distribution technology, remains central to PBS's mission. A PBS/DBS service would ensure that every U.S. television household retains easy access to public television programs. (Once a viewer subscribes to a DBS service, they may be effectively lost to their local pubic television station because viewers often drop their cable service and then must go back to their conventional antennas to receive them.)

C. *Revenue Potential.* New and expanded services would provide much needed revenue to public television, while steps would be taken to protect local stations from any lost revenues, such as through re-distribution of any national "on air" pledge dollars.

D. *"White Area" Problem.* As indicated by the Copyright Office, a PBS/DBS service would eliminate the need for local stations to engage in expensive, time-consuming enforcement procedures to ensure carrier compliance with current "white area" restrictions of the Copyright Act.

E. *National v. Local Identities.* A PBS-branded national service has broader national appeal than nationally retransmitted local services. Local stations also prefer a national feed to the re-transmission of other local stations into their markets. If the DBS industry ever evolves so that re-transmission of local stations *within* their own market becomes technically and commercially possible (*e.g.*, ASkyB), PBS agrees with the Copyright Office that this would eliminate certain problems under current law, but DBS program rights issues with respect to public television would still require Congressional action.

IV. THE PROPOSED CHANGE IS CONSISTENT WITH EXISTING LAW

Over the years, Congress has enacted many laws that demonstrate its longstanding commitment toward ensuring that public broadcasting services are universally accessible to the American public. These include, most recently, cable "must carry" legislation and the DBS set-aside. When Congress adopted the Public Broadcasting Act of 1967, it declared that "it is in the public interest [both] to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications services . . . [and] for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies." 47 U.S.C. § 396(a) (2) and (9). Enactment of this amendment to the Copyright Act would complement that ongoing commitment in the Communications Act.

Congress also acknowledged the benefit of the services provided by public broadcasters in the copyright laws when it enacted various existing preferences, exemptions and compulsory licenses. These provisions include, for example, Section 114(b) (creating a right of public broadcasting entitles to transmit sound recordings) and Section 118(d) (creating a compulsory license for public broadcasting entities to perform nondramatic musical works). These provisions remain critically important to the public broadcasters, but have not been updated for over 20 years.

V. CONCLUSION

PBS is continuing the process of clearing all of the rights for national satellite services, but PBS believes that a compulsory license under the copyright law is the best way to provide public television programming to DBS providers. Without such a license, it will be very difficult for public television to take full advantage of the set-aside for DBS noncommercial channels; we estimate it will take an additional three years before the National Program Service would be available. PBS seeks limited copyright protection that would enable it to offer DBS services to all Americans.

Mr. COBLE. Thank you, Mr. Howe.

Mr. Goodmon.

STATEMENT OF JAMES F. GOODMON, PRESIDENT AND CHIEF EXECUTIVE OFFICER, CAPITOL BROADCASTING COMPANY, INC.

Mr. GOODMON. Good morning. I am Jim Goodmon, president of Capitol Broadcasting Company, headquartered in Raleigh, North Carolina. We operate television stations in Raleigh and in Charlotte, and I am pleased to say that we put on the air in Raleigh the first high definition television station in the United States, and you are looking at the biggest supporter of HD in the country. Doesn't have anything to do with what we are talking about, but I wanted to say that.

I am also proud to say I am a member of the Gore Commission, and I am looking forward to looking at the public interest responsibilities of broadcasters, digital broadcasters, as we move ahead into the digital future.

I wanted to expand on 2 or 3 points in my written submission. We are a broadcasting company, and we were looking at the notion of putting local signals on satellites, to be retransmitted on satellite for reception in the local markets. We said to ourselves, if everything could happen like we wanted it to happen, what would the criteria be for this system? And we established four. This is from the broadcaster's perspective. We are a broadcasting company.

First and very importantly, all stations. It just would not be right for someone to come in and pick one or two stations in the market. I mean, if a satellite provider is in the market, it should be all stations including the public stations. The Public Broadcasting System is a very important part of our free over-the-air system, so our notion is it should be all stations.

The second notion is all markets. The concept of just picking some markets here and there to do that doesn't make much sense to us, so that is the second one.

The third notion is that our service should be available to all DBS providers. In other words, we don't think it is going to work for each provider to have their own local DBS retransmission. We are talking about 1,600 stations. So the notion is that our service would be made available to all the DBS providers—all stations, all markets, all DBS providers.

And then the fourth issue is that the local stations will be compensated for their signals. Now this doesn't happen very often, but we set our design criteria for the system and we have been able to do it. So what we have is the technical plan to do just what I said: all stations, all markets, available to all DBS providers. The

S. HRG. 105–472

THE COPYRIGHT OFFICE REPORT ON COMPULSORY LICENSING OF BROADCAST SIGNALS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

EXAMINING RECOMMENDATIONS OF THE COPYRIGHT LICENSING REGIMES GOVERNING THE RETRANSMISSION OF OVER-THE-AIR RADIO AND TELEVISION BROADCAST SIGNALS BY CABLE SYSTEMS, SATELLITE CARRIERS, AND OTHER MULTICHANNEL VIDEO PROVIDERS, INCLUDING A PROPOSED EXTENSION OF THE SATELLITE HOME VIEWER ACT WHICH EXPIRES IN 1999

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er's right of public performance. Internet retransmissions can be easily stored, edited and retransmitted by a recipient to other Internet users virtually anywhere in the world, almost simultaneously with the original retransmission.

This real-time, global aspect of the Internet can be particularly harmful to time-sensitive programming such as sporting events. For example, a compulsory license for Internet retransmissions would not only deny the NCAA and its members marketplace returns for the use of their events, but also further break down regional college sports broadcasting arrangements. In view of the Internet's worldwide scope, a compulsory license for Internet transmissions would even allow others to displace the sponsoring colleges and universities in the exploitation of international markets for college sports events. The compulsory license systems have shown themselves incapable of addressing and compensating damage of this kind.

Indeed, compulsory licenses for retransmissions of television broadcast signals should not be extended to any new technologies. Like an ink blot on a piece of absorbent paper, statutory licenses tend to spread from technology to technology as each new group of entrepreneurs claim entitlement to the subsidy enjoyed by their competitors. That subsidy becomes embedded in business arrangements in the new industry, and a still newer technology appears and demands subsidization in its turn. It is time to change expectations and reverse this trend.

The NCAA appreciates the opportunity to express its views on the Sections 111 and 119 compulsory copyright licenses. In summary, the NCAA recommends that Congress phase out these compulsory licenses. But while compulsory licensing remains in effect, (1) cable operators and satellite carriers should pay fair market value compensation and comply with other license terms typically found in the marketplace for all of the copyrighted programming that they retransmit; (2) the substantial costs of compulsory licensing now borne by copyright owners should be significantly reduced and more equitably apportioned between copyright owners and the beneficiaries of the compulsory licenses; and (3) the scope of the existing compulsory licenses should not be broadened to encompass new retransmission technologies, such as the Internet. I would be pleased to answer any questions Members of the Committee may have. Thank you again for this opportunity.

Prepared Statement of Fred Esplin, General Manager, KUED–TV, University of Utah

I. INTRODUCTION

I am Fred Esplin, General Manager, KUED–TV, University of Utah and member of the Board of Directors of the Public Broadcasting Service. I appreciate the opportunity to submit this testimony for the record and to express my views on the critical issues that are currently before the Congress. I will provide a brief overview of public broadcasting, and then highlight PBS's proposals for compulsory licenses relating to direct broadcast satellite (DBS) technology.

II. OVERVIEW OF PUBLIC BROADCASTING

PBS is a nonprofit membership corporation whose 173 members are licensed to operate virtually all of the nation's public television stations. PBS also represents all public broadcasting claimants in compulsory license rate-setting and royalty distribution proceedings before the Library of Congress.

Public broadcasting was created with two missions in mind—one focused on programming services, the other focused on using technology to advance education. More than 40 years ago the nation's policymakers realized that television was the most powerful communications medium yet devised. Building on the tradition of a nationwide system of land grants dedicated to public education, which led to land grant colleges and universities, a third of the country's broadcast spectrum was reserved for noncommercial educational purposes in the 1950's. Public broadcasters were entrusted with the responsibility of adapting this then-new and potent technology—television—to educational purposes. Their mandate was to serve communities across the country by providing informational, educational and cultural programming not available on commercial media.

Public broadcasting is unique in its noncommercial status and its corporate and public service mission to make educational and cultural programs available to a wide audience. Congress has repeatedly found this programming important because the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs.

Today, PBS and it member stations distribute a rich variety of educational programming to the public and to educational institutions using several distribution

means. The core service is PBS's National Program Service, which is distributed by satellite for broadcast by PBS member stations, as well as directly by DBS service to areas unserved by local broadcast stations. A related broadcast offering is PBS's Ready to Learn Service, an educational service offered in day care centers across the country that helps prepare preschoolers to enter kindergarten "ready to learn."

But public broadcasting is more than a broadcast service. The nation's number one source of classroom programming, PBS reaches 30 million students in kindergarten through 12th grade and 2 million teachers in 70,000 schools, offering a diverse mix of programming designed with specific learning objectives in mind. PBS is the world's leader in college telecourses; over 2.6 million adults have earned college credit through the PBS Adult Learning Service. PBS's popular distance learning courses are offered by broadcast, cable, satellite, and video-cassette and disc, and through the PBS ONLINE® Website. PBS is now developing a number of professional development services for teachers using a mix of distribution media. PBS ONLINE, PBS's award-winning Internet service, is widely recognized for its superlative educational depth and ease of use.

A technical leader, PBS was the first to develop closed captioning for the hearing impaired, descriptive video services for the visually impaired, stereo television services, and to transmit television programming by satellite. PBS is now at the forefront of the development of advanced digital television.

III. PUBLIC POLICY RELATING TO PBS

Over the years, Congress, various Administrations, the Copyright Office and the Federal Communications Commission have recognized the unique mission of public broadcasting by enacting many existing laws and regulations, including preferences, exemptions and compulsory licenses still in place today. These include:

Compulsory copyright to use published nondramatic musical and pictorial, graphic and sculptural works, and exemptions for various educational uses, such as transmission of sound recordings and copies embodying performance of nondramatic literary works (17 U.S.C. 118(d), 114(b) and 112(d)).

Must-carry requirements for cable services to carry public television signals.

The Cable Act requirement that DBS providers set aside 4–7% of channels for noncommercial educational and informational programming.

A requirement that PBS maintain an encrypted feed of its National Program Service so that it can be received by satellite home dish owners (without regard to any "served" versus "unserved" household distinction *See* 47 U.S.C. 605(c)).

Continued reservation of noncommercial educational spectrum for DTV.

Continued congressional funding of public broadcasting.

IV. PBS'S SATELLITE COMPULSORY LICENSE PROPOSAL

A. Background on rights clearances

Even those with a passing familiarity with the entertainment industry will understand why it is so difficult for PBS and its producers to clear the rights necessary to extend PBS's services to the public through new media and means of distribution. Every program includes a variety of separate elements, usually owned by differing interests. For example, there are rights in the script, in the music, in visual arts included in the program, in stock footage, in music composition and in music recordings. PBS is continuing the difficult process of clearing all of the rights to each of its programs for DBS use, but PBS believes that a carefully-crafted compulsory license is the best way to assure that public television programming is distributed, under the FCC's set-aside rules, to all CBS subscribers. PBS estimates that it will take an additional two to three years to clear all the rights to its National Program Service without such a mechanism.

PBS and its member stations understand why commercial entities prefer to negotiate licenses in the commercial marketplace—it provides perhaps the most efficient means of establishing the value of a property and is apt to produce the greatest financial return. Public broadcasters, however, by definition, do not operate in that marketplace. They are nonprofit, educational institutions with a public service mission. Compulsory licenses are best suited to address just this kind of situation while assuring appropriate compensation to rights holders.

B. Existing cable and satellite retransmission licenses

In PBS's view, the existing cable and satellite compulsory license schemes should be retained; they are efficient, and facilitate both the distribution of programming and the full development of these technologies. In the absence of a compulsory license, each retransmission by cable and satellite of PBS programs would require ex-

pensive, time-consuming, multi-party negotiations, undoubtedly eliminating some programming because the cost of clearing the rights would be too high.

The compulsory licenses are particularly important to PBS in view of Congress's goal of universal access to public broadcasting services, which these compulsory licenses facilitate.

C. Congress should expand or create a compulsory license to apply to PBS's national program satellite service

As further described in Attachment A, "Proposal of PBS to Amend the Copyright Act to Permit Further Distribution of PBS Programs by Satellite," PBS proposes to expand the existing satellite compulsory license to permit nationwide retransmission by DBS providers of PBS's National Program Service.

This proposal would permit PBS to offer a DBS provider a PBS satellite feed that could be retransmitted nationwide, while ensuring appropriate compensation for rights holders. As a result, both served and unserved households could obtain the PBS service from their DBS provider without the need for PBS to engage in costly and difficult renegotiations of existing program agreements.

One method to accomplish this would be to amend current Section 118, which already provides a compulsory license for the use of certain works by public broadcasters. Alternatively, Congress could amend Section 119 to cover these services.[1]

In its Report to the Senate Judiciary Committee dated August 1, 1997, the U.S. Copyright Office recommended that the PBS national satellite service be exempt from the "unserved household" restrictions of Section 119 as one means of accomplishing this same goal. PBS participated fully in the Copyright Office proceedings that led to this Report. PBS's proposals to the Copyright Office attracted virtually no comment from other interested parties and appear non-controversial.

Revision of the satellite compulsory license will help ensure that DBS providers can comply with their set-aside obligation under the Communications Act for noncommercial educational and informational programming and provide access to PBS's services to DBS viewers. In view of the unique nature and mission of public broadcasting, passage of the proposal would not constitute a precedent for similar treatment of commercial programming.

D. Expand compulsory licensing to other PBS DBS services

To further facilitate the FCC set-aside obligations of DBS providers, Congress should also extend the compulsory license regime to permit DBS providers to retransmit new PBS DBS programming services (e.g., Ready to Learn service for preschool children, instructional programs intended for teachers and students at school and home), as well as programming from other public broadcasting sources.

Improving education is a top priority of national and state policy makers, parents and businesses. DBS is a technology that could have an enormous impact in helping the nation reach its educational goals by ensuring that teachers and students have convenient and affordable access to new and improved learning opportunities. Public broadcasting has tremendous expertise in distance learning and extensive curriculum resources that could be made more accessible to millions of learners through DBS.

Access to these pioneering services could be extended significantly through DBS. Establishing a compulsory license to permit retransmission of this and similar programming is particularly important because it would help fulfill PBS's mission to make educational content available to a wide audience while also ensuring that DBS providers can comply with their new set-aside obligations.

E. Station support

The Copyright Office's recommendation concerning the PBS proposal relied upon an assumption that PBS members would support such a change. Since that time, PBS has taken several steps to confirm that support. First, PBS sponsored a detailed survey of all 178 public television licensees. The survey revealed that approximately two-thirds of the membership supported the immediate expansion of compulsory licensing to national PBS DBS services (about 10% of the membership was undecided and a minority was opposed). Then, just last week, the PBS proposal was put to a formal vote at the PBS annual membership meeting in Washington, D.C.

[1] We believe the best statutory mechanism is for PBS (or any other "public telecommunications entity" (as defined in 47 U.S.C. 397) that holds all underlying national terrestrial broadcast rights) to be the beneficiary of a separate public broadcasting satellite compulsory license, and to control its use. As a technical matter, PBS proposes a provision, worded quite like present Section 118, that effectively creates a compulsory license within the Section 119 compulsory license. DBS providers would license the PBS national feed from PBS, and PBS in turn would be responsible for the compensation of all underlying rights holders.

The official tally showed 114 of 121 station representatives voted in support of PBS's efforts in this area. Thus, 94% of stations now support the PBS proposal and favor immediate action.

V. CONCLUSION

PBS recognizes that the interests of rights holders must be protected in order to encourage the continued creation of programming for television. It is likewise important to ensure that the public has the benefit of noncommercial applications of new technologies, particularly for educational purposes. A limited expansion of compulsory licenses directed specifically at enabling widespread distribution of public broadcasting programming through DBS technologies, and subject to compensation for such distribution, reflects an appropriate balance of the interests of rights holders and the public interest.

Thank you for your time. I would be happy to answer any questions you may have.

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I. BACKGROUND

A. PBS initiative to provide a DBS service

The Satellite Home Viewer Act of 1988 requires PBS to maintain an unencrypted "feed" of its National Program Service ("NPS") to satellite home dish owners. 47 U.S.C. § 605(c). For many years, PBS maintained this free service on a single C-band satellite transponder, but in 1995, partly in response to the uncertainty over continued federal funding, PBS began to explore the possibility of offering it to the new generation of DBS operators. PBS first reached agreement with DIRECTV, the industry leader, to provide such a service and has since reached similar agreements with other DBS providers. Each of these agreements authorizes DBS providers to offer the PBS national feed to "unserved households" only (as defined in the Satellite Home Viewer Act, 17 U.S.C. § 119). The service has proved very popular with satellite viewers.

B. The DBS noncommercial reservation

In 1992, at the request of public television, Congress reserved 4–7% of DBS channel capacity exclusively for noncommercial educational and informational programming. In 1996—after four years of litigation—the court of Appeals upheld this noncommercial reservation on DBS. In April, 1997, public television filed comments at the FCC to assure maximum access to the reserved DBS capacity. The FCC is expected to issue rules to implement the set-aside later this year.

II. THE PBS/DBS PROPOSAL

At the end of the last legislative session, PBS sought an amendment to Section 119 of the Copyright Act to provide a nationwide compulsory license to permit the use of PBS's national satellite service by DBS providers. Although raised too late in the session for consideration, the amendment gained broad support.

PBS subsequently filed extensive comments at the Copyright Office proceeding instituted by Senator Hatch reiterating the 1996 proposal and advocating further that a compulsory license by created to cover new satellite "feeds," including distance learning programs, that could be used to "program" the DBS set-aside channels. The DBS medium, through the set-aside, offers exciting new opportunities to distribute instructional and educational materials, programming that has for the most part been previously unavailable to the general public. Although PBS continues to "clear" DBS rights to individual programs, a compulsory license is the most efficient way to provide a full complement of services to the public.

The Copyright Office, in its report dated August 1, 1997, acknowledged PBS's 1996 legislative proposal by recommending that the PBS national satellite service

be exempt from the "unserved household" restrictions of Section 119. PBS's proposals before the Copyright Office attracted virtually no comment from other interested parties and appear non-controversial.

III. REASONS FOR THE PROPOSAL

PBS wishes to provide public television programming services that could be redistributed by DBS providers to all households in the United States. Such services would be structured in a way that would benefit both local stations and public television's producers (many of which are also member stations). The amendment would thus implement a simple vision—that any American who wishes to receive television signals via satellite should be guaranteed ready access to the best programming public television has to offer.

Other major reasons for this proposal are as follows:

A. FCC action

PBS must act promptly to provide the educational satellite program services contemplated by the set-aside provision of the Communications Act; the set-aside is of limited practical value without the ability to clear all the necessary program rights. Without further action, an important opportunity for public television could be lost.

B. Universal access

Universal access to public television, regardless of distribution technology, remains central to PBS's mission. A PBS/DBS service would ensure that every U.S. television household retains easy access to public television programs. (Once a viewer subscribes to a DBS service, they may be effectively lost to their local public television station because viewers often drop their cable service and then must go back to their conventional antennas to receive them.)

C. Revenue potential

New and expanded services would provide much needed revenue to public television, while steps would be taken to protect local stations from any lost revenues, such as through re-distribution of any national "on air" pledge dollars.

D. "White Area" problem

As indicated by the Copyright Office, a PBS/DBS service would eliminate the need for local stations to engage in expensive, time-consuming enforcement procedures to ensure carrier compliance with current "white area" restrictions of the Copyright Act.

E. National versus local identities

A PBS-branded national service has broader national appeal than nationally retransmitted local services. Local stations also prefer a national feed to the re-transmission of other local stations into their markets. If the DBS industry ever evolves so that re-transmission of local stations within their own market becomes technically and commercially possible (e.g., ASkyB), PBS agrees with the Copyright Office that this would eliminate certain problems under current law, but DBS program rights issues with respect to public television would still require Congressional action.

IV. THE PROPOSED CHANGE IS CONSISTENT WITH EXISTING LAW

Over the years, Congress has enacted many laws that demonstrate its longstanding commitment toward ensuring that public broadcasting services are universally accessible to the American public. These include, most recently, cable "must carry" legislation and the DBS set-aside. When Congress adopted the Public Broadcasting Act of 1967, it declared that "it is in the public interest [both] to encourage the growth and development of nonbroadcast telecommunications technologies for the delivery of public telecommunications services * * * [and] for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies." 47 U.S.C. § 396(a)(2) and (9). Enactment of this amendment to the Copyright Act would complement that ongoing commitment in the Communications Act.

Congress also acknowledged the benefit of the services provided by public broadcasters in the copyright laws when it enacted various existing preferences, exemptions and compulsory licenses. These provisions include, for example, Section 114(b) (creating a right of public broadcasting entities to transmit sound recordings) and Section 118(d) (creating a compulsory license for public broadcasting entities to perform nondramatic musical works). These provisions remain critically important to the public broadcasters, but have not been updated for over 20 years.

V. CONCLUSION

PBS is continuing the process of clearing all of the rights for national satellite services, but PBS believes that a compulsory license under the copyright law is the best way to provide public television programming to DBS providers. Without such a license, it will be very difficult for public television to take full advantage of the set-aside for DBS noncommercial channels; we estimate it will take an additional three years before the National Program Service would be available. PBS seeks limited copyright protection that would enable it to offer DBS services to all Americans.

ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.,
November 26, 1997.

Re compulsory licensing of broadcast signals
Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: We are writing in regard to possible modifications of the cable and satellite compulsory licenses. In the wake of the hearings held November 12, 1997, on the recent report prepared for you by the register of copyrights, we thought it might be beneficial to apprise you of our views and concerns.

The perspective of our membership is unique, and we respectfully submit that consideration of their concerns will add materially to the debate and discussion of possible legislation in this area. The Association of Local Television Stations, Inc. ("ALTV") represents the interests of local television stations not affiliated with ABC, CBS, or NBC. Most of our member stations are affiliates of the either the Fox, UPN, or WB network. (Last week one of our members, Paxon Communications, announced the formation of a seventh broadcast network, "Pax Net.") Some remain traditional "independent" stations. Indeed, ALTV previously was "INTV," the Association of Independent Television Stations. Our membership includes stations from every region of the country. Their ownership spans the continuum from local single stations owners to large media conglomerates. Their interests range from those of nationally distributed "superstations" to those of small home shopping and "infomercial" stations. Therefore, we would appreciate your including the attached statement of our views in the record of the hearings.

Our position, fully delineated in our statement, is summarized in the following ten points:

Any rewrite of the cable and satellite compulsory licenses must be comprehensive, rather than piecemeal.

Revision of the cable and satellite compulsory licenses must be undertaken only with a keen appreciation of the longstanding interrelationship of the compulsory licenses and the ongoing regulation of cable, satellite, and other emerging media by the Federal Communications Commission.

A *limited* compulsory license should be retained for existing multichannel video providers which elect to retransmit the signals of broadcast television stations to their subscribers.

The compulsory license should permit retransmission of the signals of local television stations within their local market areas, *provided* mechanisms are in place to assure that the compulsory license is not used for discriminatory or selective carriage of local signals.

No fee should be charged for the compulsory license to retransmit local signals, again, *provided* mechanisms are in place to assure that the compulsory license is not used for discriminatory or selective carriage of local signals.

The compulsory license should facilitate carriage of a *limited* number of distant signals to accommodate the expectations of viewers who traditionally have enjoyed the programming offered by distant stations on their cable or satellite systems.

Fees for distant signals should be set to preserve the current patterns of distant signal carriage and avoid invoking the law of unintended consequences.

The distant signal compulsory license must be accompanied by provisions preserving local stations' exclusive rights to their network and syndicated programming.

The compulsory license should be structured to establish functional parity among the various competitive multichannel video providers.

The availability of the compulsory license should be limited to specific multichannel media.

We very much look forward to working with you and your staff on legislation to modify the compulsory licenses. If you are need of any particular information which

B

Before the
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In the Matter of	)	
	)	
Distribution of PBS National	)	Docket No.
Satellite Feed Royalty Funds	)	
for Calendar Years 2000 and 2001	)	

OPPOSITION OF PROGRAM SUPPLIERS AND JOINT SPORTS CLAIMANTS TO PUBLIC BROADCASTING SERVICE'S MOTION FOR DISTRIBUTION OF 2000 AND 2001 SATELLITE ROYALTY FUNDS

Program Suppliers and Joint Sports Claimants ("JSC") hereby oppose the Motion by the Public Broadcasting Service ("PBS") for a distribution to it alone of certain royalties from the 2000 and 2001 satellite royalty funds.[1] PBS's Motion asks the Copyright Office to abandon the statutory procedures set forth in the satellite carrier compulsory license, 17 U.S.C. § 119, and create from whole cloth a separate and special set of rules for distributing the royalty funds that PBS claims. Section 119, however, does not support PBS's position. Instead, it only provides for PBS to act as the designated agent for public television claimants in the context of a CARP proceeding.

There simply is no precedent or procedure for what PBS asks the Copyright Office to do. PBS asks the Copyright Office to make a distribution from the 2000 and 2001 satellite royalty funds of 100% of the royalties it is claiming for itself, even though there is a controversy concerning those funds, and it has failed to reach a consensus with all of the other Phase I claimants concerning distribution. Furthermore, PBS asks for a

[1] It was unclear to Program Suppliers and JSC whether the Copyright Office would solicit public comment on PBS's Motion, as it is yet undocketed. However, Program Suppliers and JSC note that since PBS filed its Motion, the Music Claimants have filed an Opposition and PBS has replied to that Opposition.

100% distribution from its alleged share of the 2000 and 2001 satellite royalty funds before the Copyright Office has distributed any royalties from the 1999 satellite royalty fund, over which there is also a controversy. For the reasons set forth in more detail below, PBS's Motion is ill-conceived and should be rejected.

DISCUSSION

I. PBS'S REQUEST FOR DISTRIBUTION OF THE 2000 AND 2001 SATELLITE ROYALTY FUNDS CONTRADICTS THE LANGUAGE OF THE COPYRIGHT ACT

PBS's request for distribution of portions of the 2000 and 2001 satellite royalty funds according to the *sui generis* schedule it proposes contradicts the plain language of the Copyright Act. The statutory process for distributing royalties from the satellite royalty funds has four elements, each of which places clear and unambiguous requirements on royalty claimants and the Librarian of Congress. First, each person claiming to be entitled to portions of the satellite royalty funds are required to file claims with the Librarian of Congress during the July that follows the year for which the royalty fees are paid. *See* 17 U.S.C. § 119(b)(4)(A). Second, the Copyright Act makes it clear that the royalty fees deposited with the Register of Copyrights can only be distributed after the first of August in the year that claims are filed. *See* 17 U.S.C. § 119(b)(4)(B).[2] Third, the Librarian of Congress can distribute those royalties only if it determines that no controversy exists as to how those royalty fees should be distributed. *See id.* If a controversy exists, the Librarian of Congress is required to convene a copyright arbitration royalty panel to determine the distribution of royalty fees. *See id.*

[2] In this regard, the Copyright Act expressly prohibits distribution of funds from the 2001 satellite royalty fund in February 2002, as PBS proposes. Any and all distributions from the 2001 fund must wait until at least August of 2002.

Despite the clarity of the statute with regard to the distribution process, PBS asks the Copyright Office to distribute to PBS alone PBS's claimed share of the royalties from the 2000 and 2001 satellite funds notwithstanding that there is a controversy over those funds. In support of its argument, PBS cites 17 U.S.C. § 119(c)(5), which provides only that PBS will be the designated agent for public television claimants – and argues that the provision creates an exception to the normal distribution procedures.

PBS's argument stretches § 119(c)(5) far beyond what that subsection will bear. Section 119(c)(5) states, in full:

> PUBLIC BROADCASTING SERVICE AS AGENT. – For purposes of section 802, with respect to royalty fees paid by satellite carriers for retransmitting the Public Broadcasting Service satellite feed, the Public Broadcasting Service shall be the agent for all public television copyright claimants and all Public Broadcasting Service member stations.

Contrary to PBS's contentions, § 119(c)(5) expressly provides that PBS will be the designated agent for the purposes of § 802, the section that governs CARP proceedings. Accordingly, PBS is not "exempted" in any way from the normal distribution procedures concerning satellite royalty funds, but simply has been designated as a representative of public broadcasting in CARP proceedings. PBS's "designated agent" status within a CARP proceeding does not change its status outside of a CARP proceeding, particularly with respect to fund distributions.

Furthermore, there is no textual basis for concluding that § 119(c)(5) changes the application of the established procedures for distributing the satellite royalty fund. Section 119(c)(5) itself makes no reference to distribution procedures, and Congress did not amend the distribution procedures of § 119(b)(4) when enacting § 119(c)(5). Thus, the distribution procedures of § 119(b)(4) remain the only procedures for distributing

royalties from the satellite royalty fund. Absent a change in those procedures by Congress – something Congress most certainly could have done when enacting § 119(c)(5) – the plain language of § 119(b)(4) governs the distribution of royalties from the satellite royalty funds. PBS does not, and cannot, provide any statutory basis for the special, PBS-only distribution schedule it proposes.

Despite the language of § 119(c)(5), PBS seeks to preempt the process for distributing satellite royalty funds to expropriate for itself a portion of the 2000 and 2001 funds which equals the total amount which it is claiming. The statute, however, clearly provides that a controversy must be resolved before such a distribution may occur – unless, as the Copyright Office has recognized, all of the Phase I parties agree to a partial distribution. In support of its contention, PBS cites to a 2-1 decision of the Copyright Royalty Tribunal during the arbitration of the 1989-1991 satellite royalty funds. However, that decision was made by the CRT in the context of an ongoing proceeding under the (then-applicable) statutory provisions for resolving controversies.[3]

Indeed, it is curious that PBS has only now sought a distribution of royalties from the satellite fund based on the fact that it is the *only* party entitled to royalties from carriage of PBS signals. During the entire existence of the satellite fund, PBS has been aware of the carriage of individual PBS stations and the royalties resulting therefrom, but has not sought distributions of those royalties in its capacity as the Phase I representative for the public television claimants in the same manner. Certainly, under PBS's logic, a distribution of the 1999 satellite royalties could be made on the same basis.

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[3] Once a CARP proceeding has been initiated to resolve the controversy with regard to the 1999 and 2000 satellite funds, PBS can raise whatever arguments it chooses based on that prior CRT ruling. However, it is improper for PBS to do so at this stage.

PBS provides no textual support for its position. Nor does PBS cite to any of the committee reports or statements of members of Congress regarding the Satellite Home Viewer Improvement Act of 1999. Instead, it relies substantially on the congressional testimony of Tom Howe and Fred Esplin. As the Supreme Court has noted, congressional testimony should be afforded little or no weight in interpreting a statute. *See, e.g., Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1311 (2001) (criticizing the use of testimony of interested parties as an indication of congressional intent). Moreover, Howe's and Esplin's testimony is self-serving in that they are both members of the PBS family: Howe was the Director and General Manager of the University of North Carolina Center for Public Broadcasting; and Esplin the General Manager of KUED-TV, a public television station. These purported "authorities" are simply another part of PBS's unilateral attempt to claim an exemption to the established statutory procedures for distributing royalties. Accordingly, because it has no legal support, PBS's Motion must fail.

II. THE COPYRIGHT OFFICE SHOULD DECLARE A CONTROVERSY AS TO THE DISTRIBUTION OF THE 1999 AND 2000 SATELLITE ROYALTY FUNDS

Instead of simply passing over the 1999 satellite royalty fund, the Copyright Office should initiate arbitration proceedings with regard to that fund and the fund for the year 2000. Contemporaneous with this Opposition, the Program Suppliers and JSC are filing a Petition to Declare Controversy and Initiate A CARP Proceeding with regard to the Phase I distribution of the 1999 and 2000 satellite royalty funds. The relevant Phase I parties to the 1999 and 2000 satellite royalty fund have met and have been unable to resolve their disputes as to how that royalty fund should be distributed. A CARP

proceeding as to the 1999 and (on August 1, 2001) 2000 satellite royalty funds is therefore ripe. Accordingly, pursuant to its customary procedure, the Copyright Office should publish a Notice of Inquiry into the controversies related to that fund.

III. A PARTIAL DISTRIBUTION IS ACCEPTABLE UPON AGREEMENT OF ALL PHASE I PARTIES

PBS asks, in the alternative, the Copyright Office to distribute a "substantial partial distribution" of the 2000 and 2001 satellite royalty funds "attributable" to the PBS National Feed. The Program Suppliers and JSC have no objection to a substantial partial distribution of all of the 1999, 2000 and 2001 satellite royalty funds when appropriate, as the Phase I parties have agreed in the past. The Program Suppliers and JSC are willing to, as in years past, agree to a partial distribution of the 2000 satellite royalty funds (perhaps as much as 75% of that fund, if it is acceptable to all Phase I parties) at the earliest possible date. Such a partial distribution, however, should be done with the agreement of all Phase I parties, and by proper Motion to the Copyright Office.

CONCLUSION

For the reasons stated, the Copyright Office should deny PBS's motion to distribute royalties from the 2000 and 2001 satellite royalty funds. The Copyright Office should further declare a controversy as to the 1999 and 2000 satellite royalty fund and initiate a CARP proceeding for the purposes of determining the proper Phase I distribution of that fund.

Respectfully Submitted,

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July 20, 2000

CERTIFICATE OF SERVICE

I, Christopher Winters, hereby certify that I have caused copies of the foregoing: (1) Opposition Of Program Suppliers And Joint Sports Claimants To Public Broadcasting Service's Motion For Distribution Of 2000 And 2001 Satellite Royalty Funds; and (2) Petition To Declare Controversy And Initiate A Carp Proceeding With Regard To The Phase I Distribution Of The Satellite Royalty Funds For 1999 And 2000, to be sent via first-class mail, postage pre-paid, this 20th day of July, 2001, to the following:

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August 10, 2001

BY HAND DELIVERY

Office of the General Counsel
United States Copyright Office
James Madison Memorial Building
Room 403
First and Independence Avenue, SE
Washington, DC 20540

Re: Distribution of PBS National Satellite Feed Royalty Funds for Calendar Years 2000 and 2001

Dear Sir:

Enclosed please find an original, five copies, and an extra copy of the Response of Public Broadcasting Service to Opposition of Program Suppliers and Joint Sports Claimants to Motion for Distribution of PBS National Satellite Feed Royalty Funds for Calendar Years 2000 and 2001.

Please date-stamp the extra copy and return it to our waiting messenger.

Thank you.

Sincerely,

Ronald G. Dove, Jr.

Counsel for Public Broadcasting Service

Before the
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Library of Congress

In the Matter of	)	
	)	
Distribution of PBS National	)	Docket No.
Satellite Feed Royalty Funds	)	
for Calendar Years 2000 and 2001	)	

RESPONSE OF PUBLIC BROADCASTING SERVICE TO OPPOSITION OF PROGRAM SUPPLIERS AND JOINT SPORTS CLAIMANTS TO MOTION FOR DISTRIBUTION OF PBS NATIONAL SATELLITE FEED ROYALTY FUNDS FOR CALENDAR YEARS 2000 AND 2001

The Public Broadcasting Service ("PBS"), as statutory agent for "all public television copyright claimants and all Public Broadcasting Service member stations," *see* 17 U.S.C. § 119(c)(5), submits this brief response to the Opposition of Program Suppliers and Joint Sports Claimants ("Opp.") to the Motion of Public Broadcasting Service for Distribution of PBS National Satellite Feed Royalty Funds for Calendar Years 2000 and 2001 ("PBS Mot."). The Program Suppliers and Joint Sports Claimants ("PS-JSC") oppose PBS's motion despite the fact that they provide no programming on the PBS National Feed and have absolutely no claim to the PBS National Feed royalties.

It is well established that the Copyright Office has the authority to distribute "any [royalty] amounts that are not in controversy." 17 U.S.C. § 119(b)(4)(C) (emphases added). PS-JSC have not asserted a controversy as to the PBS National Feed royalty fund. Their contentions (Opp. 5-6) relate solely to asserted controversies over other satellite funds that are not at issue here. The 1999-2000 satellite royalties discussed in the PS-JSC

opposition are not addressed in PBS's motion and are wholly separate from the specially-created PBS National Feed royalties that are at issue here. *See* PBS Mot. 2-4 (discussing special nature of PBS National Feed royalties). Merely asserting that a controversy exists with regard to the general satellite royalty fund does not change the fact that there is no such controversy with regard to the separately calculable PBS National Feed royalty fund. Accordingly, the Copyright Office should grant PBS's motion for distribution of that fund and should reject any effort to inject other disputes into the straightforward issue presented as to the distribution of the National Feed fund that is not in controversy.[1] *See 1989-1991 Satellite Carrier Royalty Distribution Proceedings,* CRT Docket Nos. 91-1-89SCD, 91-5-90SCD, 92-2-91SCD (Dec. 4, 1992) (claimants whose copyrighted works were not carried by the stations at issue were not entitled to share in the distribution of the separately calculable royalty fund comprised of fees paid by satellite carriers to retransmit such stations).

For the reasons addressed in its opening memorandum, PBS continues to believe that Section 119 requires that all royalties generated from the PBS National Feed should be distributed directly to PBS, given that it is PBS, the public television copyright claimants and the PBS member stations – not PS-JSC – that earned the royalties and

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[1] The approach proposed by PS-JSC would make it much more difficult for the Copyright Office to fulfill its obligation of distributing royalties "not in controversy," given that any claimant could create a controversy simply by arguing that the proposed royalty pool was too narrowly defined and should be expanded to encompass other funds and/or years. It is for this reason, presumably, that when the Copyright Office directs claimants to submit comments as to whether a controversy exists as to a particular fund, it also requires claimants to comment on "the extent of those controversies," so that the Copyright Office can segregate what is in controversy from what is not, and make distributions accordingly. *See, e.g., Ascertainment of Controversy for the 1998 Cable Royalty Funds,* 65 Fed. Reg. 54077 (2000).

furnished the programs that were retransmitted by the satellite carriers making the payments. Even if the Copyright Office disagrees, however, at a minimum it should promptly make a partial distribution to PBS of 90% of the PBS National Feed royalties for CY 2000 now that the July deadline for filing claims has passed. At a minimum, that 90% amount is clearly not in controversy.

All claimants appear to agree that a partial distribution of the PBS National Feed royalties is appropriate. PS-JSC "are willing to . . . agree to a partial distribution of the 2000 satellite royalty funds (perhaps as much as 75% of that fund, if it is acceptable to all Phase I parties) at the earliest possible date." Opp. 6. The only claimants who have asserted a claim to any of these National Feed funds, the Music Claimants, state that they "have no objection to an appropriate partial distribution in this instance" of the National Feed royalties. Music Opp. 5.[2] Because the Music Claimants assert a claim to only 4.5% of those royalties (Music Opp. 6; SESAC Opp. 2), and because PS-JSC have absolutely no claim whatever to those royalties, the Copyright Office at a minimum should proceed immediately to make a partial distribution of no less than 90% of those royalties.

The PBS National Feed provisions are unique and limited in scope; any further delay in distributing the National Feed royalties "not in controversy" would run counter to the statute and would frustrate the congressional purpose of ensuring that public television copyright claimants and PBS member stations receive a prompt distribution of

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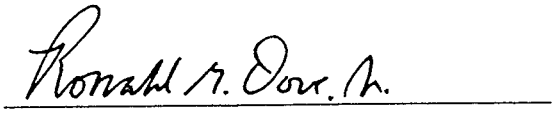
2 *See also* SESAC Opp. 2 ("partial distribution of 75% should be made and split between those groups making legitimate claims to royalties in connection with the National Feed"); Response of Public Broadcasting Service to Music Claimants' Opposition to Motion for Distribution of PBS National Satellite Feed Royalty Funds for Calendar Years 2000 and 2001 (discussing why 90% is an appropriate partial distribution).

funds to support their important mission of creating educational and cultural programming for the public.

For these reasons and those stated in PBS's opening memorandum, the Copyright Office should make a prompt distribution to PBS of at least 90% of the PBS National Feed royalties.

Dated: August 10, 2001

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Ronald G. Dove, Jr., hereby certify that I have caused copies of the foregoing RESPONSE OF PUBLIC BROADCASTING SERVICE TO OPPOSITION OF PROGRAM SUPPLIERS AND JOINT SPORTS CLAIMANTS TO MOTION FOR DISTRIBUTION OF PBS NATIONAL SATELLITE FEED ROYALTY FUNDS FOR CALENDAR YEARS 2000 AND 2001, to be sent via first-class mail, postage pre-paid, this 10th day of August, 2001, to the following:

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LICENSING DIVISION
REPORT OF RECEIPTS
11/27/2002

CABLE YEAR/PERIOD	TOTAL DEPOSITS	PERCENT GROWTH	LAST DEPOSIT	TOTAL DEPOSIT BY YEAR	PERCENT GROWTH
2002/1	$56,598,351.86		11/27/02	$56,598,351.86	
2001/2	$61,297,598.23	-7.04%	11/27/02		
2001/1	$60,398,931.48	12.10%	11/27/02	$121,696,529.71	
2000/2	$65,938,446.80	26.19%	11/25/02		
2000/1	$53,879,632.55	-3.72%	11/27/02	$119,818,079.35	10.72%
1999/2	$52,255,332.01	-3.84%	11/19/02		
1999/1	$55,959,753.84	3.81%	11/19/02	$108,215,085.85	-0.03%
1998/2	$54,340,700.43	-30.24%	11/19/02		
1998/1	$53,904,175.51	-29.53%	10/10/02	$108,244,875.94	-29.89%
1997/2	$77,897,177.03	-12.64%	10/29/02		
1997/1	$76,492,423.30	-13.51%	10/10/02	$154,389,600.33	-13.07%
1996/2	$89,167,182.55	6.27%	10/10/02		
1996/1	$88,437,592.00	7.90%	10/10/02	$177,604,774.55	7.08%
1995/2	$83,907,096.08	7.30%	10/10/02		
1995/1	$81,960,649.95	-1.34%	10/10/02	$165,867,746.03	2.85%
1994/2	$78,196,030.97	-14.25%	10/10/02		
1994/1	$83,075,402.53	-11.79%	10/10/02	$161,271,433.50	-13.00%
1993/2	$91,191,594.60	-3.13%	10/10/02		
1993/1	$94,178,034.43	-0.23%	10/10/02	$185,369,629.03	-1.68%
1992/2	$94,141,605.51	4.17%	10/10/02		
1992/1	$94,395,509.25	4.45%	10/10/02	$188,537,114.76	4.31%
1991/2	$90,376,546.52	6.55%	09/25/01		
1991/1	$90,377,530.97	5.68%	08/06/01	$180,754,077.49	6.12%
1990/2	$84,819,184.06	-20.23%	09/25/01		
1990/1	$85,516,106.37	-15.99%	08/06/01	$170,335,290.43	-18.16%
1989/2	106,334,641.82	9.86%	02/07/00		
1989/1	$101,791,428.09	5.69%	02/07/00	$208,126,069.91	7.78%
1988/2	$96,790,674.13	13.22%	02/11/00		
1988/1	$96,313,222.58	24.00%	02/07/00	$193,103,896.71	18.35%
1987/2	$85,492,494.64	34.43%	02/07/00		
1987/1	$77,670,697.05	27.06%	02/07/00	$163,163,191.69	30.82%
1986/2	$63,598,235.16	17.39%	03/29/99		
1986/1	$61,127,239.88	20.80%	03/29/99	$124,725,475.04	19.04%
1985/2	$54,176,727.47	12.52%	03/29/99		
1985/1	$50,600,540.70	14.67%	03/29/99	$104,777,268.17	13.55%
1984/2	$48,147,686.81	27.01%	03/29/99		
1984/1	$44,125,211.41	26.56%	03/29/99	$92,272,898.22	26.79%
1983/2	37,908,842.40	74.87%	03/29/99		
1983/1	$34,866,118.27	79.00%	03/29/99	$72,774,960.67	76.82%
1982/2	21,678,644.31	28.16%	08/08/96		
1982/1	$19,478,229.04	39.42%	08/08/96	$41,156,873.35	33.25%
1981/2	16,915,355.02	64.22%	03/18/93		
1981/1	$13,970,764.29	43.38%	03/18/93	$30,886,119.31	54.09%
1980/2	10,300,643.55	24.74%	03/18/93		
1980/1	$9,743,848.23	27.67%	03/18/93	$20,044,491.78	26.15%
1979/2	8,257,623.65	25.63%	03/18/93		
1979/1	$7,632,169.73	20.44%	03/18/93	$15,889,793.38	23.08%
1978/2	6,572,982.50		03/18/93		
1978/1	$6,337,044.38		03/18/93	$12,910,026.88	

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SATELLITE CARRIERS YEAR/PERIOD	TOTAL DEPOSITS	PERCENT GROWTH	LAST DEPOSIT	TOTAL DEPOSIT BY YEAR	PERCENT GROWTH
2002/1	$34,186,301.93	-7.21%	09/26/02	$34,186,301.93	
2001/2	$37,186,165.31	7.18%	01/31/02		
2001/1	$36,842,154.99	10.64%	09/20/02	$74,028,320.30	8.87%
2000/2	$34,696,199.62	18.08%	10/29/01		
2000/1	$33,298,565.71	-35.08%	10/29/01	$67,994,765.33	-15.72%
1999/2	$29,383,056.92	-45.41%	05/04/00		
1999/1	$51,290,949.82	-7.96%	10/05/99	$80,674,006.74	-26.36%
1998/2	$53,821,069.71	128.81%	01/19/00		
1998/1	$55,727,832.06	189.80%	08/07/98	$109,548,901.77	156.24%
1997/2	$23,522,196.82	52.62%	03/18/98		
1997/1	$19,229,571.70	41.93%	11/07/97	$42,751,768.52	47.62%
1996/2	$15,412,271.22	25.22%	02/26/97		
1996/1	$13,548,288.52	23.67%	08/06/96	$28,960,559.74	24.49%
1995/2	$12,307,755.12	23.41%	02/20/96		
1995/1	$10,954,852.38	36.03%	10/04/95	$23,262,607.50	29.05%
1994/2	$9,973,123.68	47.74%	06/05/95		
1994/1	$8,053,301.13	55.14%	09/13/94	$18,026,424.81	50.96%
1993/2	$6,750,269.48	72.79%	03/28/94		
1993/1	$5,190,922.06	99.74%	08/27/93	$11,941,191.54	83.55%
1992/2	$3,906,711.02	103.26%	05/05/93		
1992/1	$2,598,879.32	49.24%	08/03/92	$6,505,590.34	77.58%
1991/2	$1,921,990.44	17.22%	03/06/92		
1991/1	$1,741,464.97	14.87%	03/06/92	$3,663,455.41	16.09%
1990/2	$1,639,662.03	22.83%	05/14/91		
1990/1	$1,515,974.06	39.25%	07/31/90	$3,155,636.09	30.21%
1989/2	$1,334,880.11		08/30/90		
1989/1	$1,088,677.39		08/01/89	$2,423,557.50	

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DART YEAR/PERIOD	TOTAL DEPOSITS	PERCENT GROWTH	LAST DEPOSIT	TOTAL DEPOSIT BY YEAR	PERCENT GROWTH
2002/4	$17,354.27		05/09/02		
2002/3	$940,018.04		11/20/02		
2002/2	$836,099.33	18.06%	11/15/02		
2002/1	$588,463.01	-54.02%	08/16/02	$2,381,934.65	
2001/4	$1,021,604.38	-43.25%	10/21/02		
2001/3	$938,408.89	-32.63%	07/16/02		
2001/2	$708,177.59	-42.61%	11/15/02		
2001/1	$1,279,765.50	28.07%	07/16/02	$3,947,956.36	-27.25%
2000/4	$1,800,229.02	83.04%	07/16/02		
2000/3	$1,392,989.74	63.02%	04/20/01		
2000/2	$1,233,971.69	48.45%	08/14/02		
2000/1	$999,304.59	13.33%	04/26/01	$5,426,495.04	52.81%
1999/4	$983,534.91	42.46%	02/05/01		
1999/3	$854,480.25	31.49%	02/05/01		
1999/2	$831,224.09	159.18%	07/27/00		
1999/1	$881,791.61	177.73%	07/27/00	$3,551,030.86	79.48%
1998/4	$690,395.12	142.37%	07/27/00		
1998/3	$649,858.83	161.44%	10/27/00		
1998/2	$320,707.65	90.41%	07/27/00		
1998/1	$317,496.33	18.76%	07/27/00	$1,978,457.93	104.14%
1997/4	$284,846.45	319.38%	07/27/00		
1997/3	$248,570.01	109.47%	07/27/00		
1997/2	$168,428.23	77.76%	07/27/00		
1997/1	$267,333.37	130.83%	07/27/00	$969,178.06	144.03%
1996/4	$67,920.48	-42.96%	07/27/00		
1996/3	$118,666.76	-13.89%	07/27/00		
1996/2	$94,748.82	-11.41%	07/27/00		
1996/1	$115,816.46	5.52%	07/27/00	$397,152.52	-16.14%
1995/4	$119,077.97	-18.84%	07/27/00		
1995/3	$137,808.40	5.36%	07/27/00		
1995/2	$106,950.25	-30.56%	05/31/00		
1995/1	$109,755.58	21.36%	05/31/00	$473,592.20	-9.27%
1994/4	$146,726.29	22.47%	05/31/00		
1994/3	$130,803.26	23.19%	05/31/00		
1994/2	$154,028.62	29.41%	05/31/00		
1994/1	$90,441.47	-48.36%	05/22/98	$521,999.64	0.35%
1993/4	$119,806.92	1.34%	09/14/94		
1993/3	$106,179.39		05/31/00		
1993/2	$119,024.84		05/31/00		
1993/1	$175,151.69		05/31/00	$520,162.84	339.97%
1992/4	$118,227.42		07/31/94	$118,227.42	

CERTIFICATE OF SERVICE
Docket No. 2001-8 CARP CD 98-99

I hereby certify that copies of the foregoing Rebuttal Findings and Conclusions of the Joint Sports Claimants was sent on September 5, 2003, by hand delivery and overnight mail, to the following parties:

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